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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, *et al.*,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA,
Respondent,

KAISER CEMENT CORPORATION, *et al.*,
Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is an absent member of a class certified under Rule 23, Federal Rules of Civil Procedure, a "party" within the meaning of 28 U.S.C. § 455(b)(4) such that the Justices of the Supreme Court, district and circuit judges, and members of the Judicial Panel on Multidistrict Litigation must recuse themselves if they or their spouses own stock in any absent class member?

PARTIES TO THE PROCEEDING

Petitioners are named plaintiffs in *In re Cement and Concrete Antitrust Litigation,* MDL Docket No. 296, a multidistrict class action currently pending in respondent United States District Court for the District of Arizona, and are listed in note 2, *infra.* Real parties in interest, defendants below, are listed in note 3, *infra.*

Petitioners recognize that compliance with Supreme Court Rules 21 and 28 ordinarily is accomplished in class actions by listing only the named representative parties. *E.g., Weyerhaeuser Co.* v. *Lyman Lamb Co.,* No. 81-1618 and *Georgia-Pacific Corp.* v. *Lyman Lamb Co.,* No. 81-1619, ____ U.S. ____, 102 S.Ct. 2232 (1982), *granting cert. sub nom. In re Plywood Antitrust Litigation,* 655 F.2d 627 (5th Cir. 1981). However, the Ninth Circuit's opinion in this case (Appendix A hereto) affirmed a district court order (*In re Cement and Concrete Antitrust Litigation,* 515 F. Supp. 1076, 1079-80 (D. Ariz. 1981)) holding that all 210,235 putative members of the classes herein are "parties" for purposes of recusal under 28 U.S.C. § 455(b)(4), thus compelling the identification of all class members as "parties." Accordingly, petitioners are filing concurrently herewith a "Motion for Relief from Compliance with Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3" to obtain (A) leave to serve this petition on only the named parties below, and (B) a ruling that the single copy of the class list lodged with the Clerk of the Court with the related petition for a writ of certiorari in No. 82-287 (filed August 16, 1982) satisfies all other filing requirements for this petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered October 1, 1982.

OPINIONS BELOW

The Opinion filed May 26, 1981, by Chief District Judge C. A. Muecke is reported at 515 F. Supp. 1076 (D. Ariz. 1981), and is reprinted as Appendix B to the petition for a writ of certiorari in No. 82-287.[1] The October 1, 1982 opinion by the United States Court of Appeals for the Ninth Circuit affirming Judge Muecke's decision is not yet officially reported, and is reprinted as Appendix A hereto.

JURISDICTION OF THIS COURT

The Opinion of the United States Court of Appeals for the Ninth Circuit was entered on October 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute involved is 28 U.S.C. § 455, reprinted as Appendix I to the petition in No. 82-287.

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[1] On August 16, 1982 petitioners herein filed a petition for a writ of certiorari from the January 27, 1981 opinion of the Court of Appeals for the Ninth Circuit, as modified April 15, 1982, rejecting jurisdiction to review Chief Judge Muecke's May 26, 1981 recusal decision under 28 U.S.C. §§ 1291 and 1292(b). That petition has been assigned this Court's Docket No. 82-287, and is related to the instant petition in that (A) both arise from the same matter, and (B) No. 28-287 presents as a threshhold question the substantive issue of recusal law presented here. On October 12, 1982 this Court granted petitioners' motion to defer consideration of No. 82-287 in order to consolidate review of that petition with evaluation of the instant petition. Accordingly, petitioners incorporate herein by reference the Appendices to petition No. 28-287.

STATEMENT OF THE CASE

Beginning in September 1976, petitioners[2] brought a total of 32 separate actions in 12 different district courts, individually and as class representatives, seeking monetary and injunctive relief from the real parties in interest and other defendants[3] for an alleged conspiracy to fix, stabilize and maintain the price of cement and cement-containing products throughout the United States in violation of section 1 of the Sherman Act, 15 U.S.C.

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[2] Petitioners and/or plaintiffs below are: the States of Alabama, Arizona, California, Colorado, Florida, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, New Mexico, Oregon, Texas and Utah; Rubenstein Development Company and Harry Rubenstein; Bill Carson d/b/a Bill Carson Construction and Bill Carson Construction Co., Inc.; Leavell Company; James I. Barnes Construction Co. and James I. Barnes Construction Co., Inc.; William P. Jungelaus; Buck Brown Contracting Company, Inc.; Hechinger Company; Katterjohn Concrete Products of Owensboro, Kentucky, Inc.; The Sta-Dri Company; York Concrete Co. and York Concrete, Inc.; Sea Foamed of San Diego and Sea Foamed of Arizona; Vincent S. Perry and Ellis F. Hendricks, individually and d/b/a Perry and Hendricks; Estes Homes; The Lusk Corp., Marved Construction, Inc.; Beauty Built Homes, Inc., Witt Construction Co., Inc.; Meadowlane Estates, Inc.; Wood Bros. Homes, Inc.; Sabino Vista Realty & Developments, Inc.; Melvin Zuckerman; Loma Verde Development Co.; Wood Bros. Lumber Co.; Blankenship Builders, Inc. and Blankenship Construction Co.; Wooldridge Construction Co.; John Talley and John Talley Construction, Inc.; Picou's Builders Supply, Inc.; City of Austin, Texas; Northern Materials, Inc.; Smith & Green Corp., Allen R. Smith and Raymond Green; Colorado Concrete Mfg. Co.; Walter K. Laursen d/b/a Thriftway Lumber and Thriftway Lumber Company; and Edward W. Bergquist, as Trustee in Bankruptcy for Western Concrete Products Corp.

[3] Real parties in interest and/or defendants below are: Alamo Cement Corp.; Alpha Portland Industries, Inc.; Arkansas Cement Corp.; Ash Grove Cement Co.; Capitol Aggregates, Inc.; Centex Corp.; Centex Cement Corp.; Citadel Cement Corp.; Columbia Cement Corp.; Coplay Cement Mfg. Co.; Cyprus Hawaiian Cement Corp.; Dundee Cement Co.; Filtrol Corp.; General Portland, Inc.; Giant Portland Cement Co.; Ideal Basic Industries, Inc.; Kaiser Cement Corp.; Keystone Portland Cement Co.; Lehigh Portland Cement Co.; Lone Star Industries, Inc.; Louisville Cement Co.; Marquette Co.; Martin-Marietta Corp.; Medusa Corp.; Missouri Portland Cement Co.; Monarch Cement Co.; Monolith Portland Cement Co.; National Cement Co., Inc.; National Gypsum Co.; Nevada Cement Co.; OKC Corporation; Oregon Portland Cement Co.; Portland Cement Association; Portland Cement Co. of Utah; Santee Portland Cement Corp.; The Flintkote Co.; United States Steel Corp.; Valley Cement Industries, Inc.; Whitehall Cement Mfg. Co.; and Wyandotte Cement Inc. Pursuant to Supreme Court Rule 28.1, a listing of all parent companies, subsidiaries, and affiliates of the various real parties in interest known to petitioners is set forth in Appendix J to the petition in No. 82-287 and Appendix I to respondents' brief in opposition in No. 82-287.

§ 1. The jurisdiction of the district court is based upon 28 U.S.C. §§ 1331 and 1337 and sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. On September 12, 1977, the Judicial Panel on Multidistrict Litigation transferred these actions to respondent United States District Court for the District of Arizona and assigned them to Chief Judge C. A. Muecke for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407. *In re Cement and Concrete Antitrust Litigation*, 437 F. Supp. 750 (J.P.M.D.L. 1977). *See also In re Cement and Concrete Antitrust Litigation*, 465 F. Supp. 1299 (J.P.M.D.L. 1979).

Following extensive discovery and voluminous briefing, Chief Judge Muecke certified that these actions should proceed as class actions pursuant to Rule 23, Federal Rules of Civil Procedure. *In re Cement and Concrete Antitrust Litigation*, 1979-1 CCH Trade Cases ¶ 62,502 (D. Ariz. 1979). Further discovery was then undertaken and a master class list of 210,235 names and addresses compiled. *In re Cement and Concrete Antitrust Litigation*, 673 F.2d 1020, at 1022 (9th Cir. 1982). Using this list for mailed notice and also giving supplementary notice by publication, the putative class members were advised pursuant to Rule 23(c)(2), Federal Rules of Civil Procedure, of the pendency of this litigation and of their right to be excluded from the classes.[4] The deadline for putative class members to seek exclusion from the class expired on December 31, 1980 and, more than four years after the litigation was first commenced, the membership of the class was finally fixed.

On February 23, 1981, the real parties in interest filed a motion asking Chief Judge Muecke to recuse himself under 28 U.S.C. § 455(b)(4). CA9 App. Ex. 14. That motion was based on the fact that Chief Judge Muecke's wife had inherited as her sole and separate property stock in seven absent class members. 515 F. Supp. at 1080, 1082-83. The motion argued that Chief Judge Muecke was required to recuse himself no

[4] Exhibit 6 in "Appendix to Petition for Permission to Appeal From the United States District Court for the District of Arizona Pursuant to Title 28 U.S.C. § 1292(b) and Brief of Petitioner" (hereinafter "CA9 App. Ex. ").

matter how insignificant his wife's stock holdings because (1) absent class members are "parties" to the litigation within the meaning of 28 U.S.C. § 455(b)(4), and (2) his wife's stock ownership was "a financial interest in the subject matter in controversy" under section 455(b)(4).

Based solely on his conclusion that absent class members are parties,[5] Chief Judge Muecke granted the motion of the real parties in interest and recused himself on May 26, 1981. Chief Judge Muecke noted that any conceivable financial benefit to his wife was so insignificant that it could not "seriously be contended that [his] continuation in this matter creates the appearance of impropriety," (515 F. Supp. at 1081) and lamented over the wastefulness and inefficiency of transferring the litigation to a new judge.[6] Nonetheless, he interpreted section 455(b)(4) as imposing a mandatory requirement of recusal based upon his wife's stock ownership in absent class members:

> I have concluded that I must recuse myself, not because I feel a sense of conflict, and not because I feel that to

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[5] With regard to the alternative basis for recusal advanced by the real parties in interest, Chief Judge Muecke found "the term 'subject matter in controversy' to be inherently vague," but noted that his "conclusion that the 'parties' provision of § 455 is applicable to the present case makes the resolution of the 'subject matter in controversy' issue unnecessary." 515 F. Supp. at 1080. The Ninth Circuit noted that it was "fully briefed and argued . . . both before the district court and this court," and stated:

> we have no hesitation in concluding, for purposes of our mandamus analysis, that Judge Muecke was not required to recuse himself on the latter ground.

Appendix A at A-17, n.8.

[6] Chief Judge Muecke commented:

> Compare my wife's financial interest in this litigation with the burden of applying § 455. As I have said, this case is into its sixth year. This Court has entered 75 pretrial orders, decided countless motions, and retains a working knowledge of where the suit has been and where it is headed. Such knowledge is crucial to competent case management. To transfer five and one-half years of work and paper to a new judge seems unfair, not only to the parties, but to the unlucky transferee and will in all likelihood be the occasion for delay. Decisions which might routinely be disposed of by me may well take a new judge longer until he has the opportunity to become acquainted with the case.

515 F. Supp. at 1081 (footnote omitted).

> continue would create the appearance of impropriety. I have concluded that I must recuse myself for the sole reason that the law, as written, says I must.

515 F. Supp. at 1078.

On October 1, 1982 the Court of Appeals for the Ninth Circuit issued an opinion on a petition for a writ of mandamus from Chief Judge Muecke's ruling in which it "reluctantly agree[d]":

> Thus, after five years of litigation, a multi-million dollar lawsuit of major national importance, with over 200,000 class plaintiffs, grinds to a halt over Mrs. Muecke's $29.70. A new judge must now be assigned to conduct further proceedings.

Appendix A at A-31 and A-27. The Ninth Circuit noted that Congress had not considered the application of the *per se* recusal rule to class actions in enacting section 455, and agreed with Chief Judge Muecke that "[w]hen applied to complex multidistrict class actions . . . the statute appears to break down." *Id.* at A-19. The Court also recognized that "general law does not treat members and parties in an identical fashion . . . [as] a concession to the nature of class action suits and the purposes of Rule 23: if every class member had to be treated as a party in all circumstances, the purposes of Rule 23 might in some instances be frustrated." *Id.* at A-19-20.

Nevertheless, relying on the fact that "class members and parties are treated in substantially the same manner in regard to the substantive benefits and burdens of judgment" (*Id.* at A-20), the Ninth Circuit concluded that "for purposes of section 455, stock ownership in a class member constitutes an interest in 'a party to the proceeding.'" *Id.* at A-21-22. The Circuit Court also found support for its holding in the fact that Congress' concern for the avoidance of the appearance of impropriety caused it to reject the provision of the ABA Code of Judicial Conduct which permits the waiver of disqualification if a judge's interest in a party is insubstantial.

The Ninth Circuit recognized that the "administrative burden of applying section 455 in class action proceedings is far greater than in normal civil cases," and opined that application

of section 455 "in class action cases would seem to warrant congressional consideration." *Id.* at A-29. It noted that a judge in a class action can neither control the separate financial affairs of his or her spouse, nor follow the House Judiciary Committee's suggestion to confine investments to companies "not likely to become litigants in his court." *Id.* at A-29-30 and n.18. In the *Cement Litigation* alone there are over 210,000 putative class members, virtually a lifetime's worth of "parties" in a single suit. Despite questioning whether "the actual benefits of applying the *per se* rule in [class actions] outweigh the resultant disruption to the orderly and efficient administration of the judicial system" (*Id.* at A-30), the Ninth Circuit interpreted section 455 to require recusal upon the ownership of stock in a class member.

The Judicial Panel on Multidistrict Litigation has refused to appoint a new district judge to replace Chief Judge Muecke until after this matter is resolved. (Appendix H to petition No. 82-287). If the Judicial Panel follows the reasoning of the Ninth Circuit, it may be incapable of assigning a new judge.[7] Thus, some 17 months have now passed since Chief Judge Muecke recused himself, and serious questions exist over whether the Judicial Panel can appoint a new judge.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE RULES OF THE SUPREME COURT AND ALL CIRCUIT COURTS OF APPEAL

None of the administrative rules of this Court or any circuit court of appeals requires the submission of a list of class

[7] Under 28 U.S.C. § 1407(d), the concurrence of four Panel members is necessary "to any action by the Panel." The 1982 financial disclosure statements of Judges Caffrey, Daugherty, Harper and Pointer show stock holdings in entities on the Master Class List. Therefore, only three Panel members would not own stock "in a party to the proceeding" under the Ninth Circuit's ruling.

members to the clerk of the court for disqualification purposes.[8] Indeed, the normal practice in class actions under Supreme Court Rules 21 and 28.1 is simply to list the actual named parties to the proceeding and all parent, subsidiary and affiliate corporations. *Mead Corp.* v. *Adams Extract Co.*, ____ U.S.____, 102 S.Ct. 1994 (1982), *denying cert. sub nom. In re Corrugated Container Grand Jury*, 659 F.2d 1330 (5th Cir. 1981), and *Weyerhaeuser Co.* v. *Lyman Lamb Co.*, No. 81-1618, and *Georgia-Pacific Corp.* v. *Lyman Lamb Co.*, No. 81-1619, ____U.S.____, 102 S.Ct. 2232 (1982), *granting cert. sub nom. In Re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981). These are cases, like the present one, involving nationwide classes including large, publically owned corporations. Yet in neither of those cases did this Court have before it a list of all class members.[9] Since the administrative rules of this and other federal courts must reflect substantive law (28 U.S.C. §§ 2071 and 2072), the Ninth Circuit's decision stands in conflict with the decisions of this Court and all other circuit courts regarding the need to explore possible interests in class members when evaluating potential disqualification.

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[8] *See* District of Columbia Circuit Rule 8(c); First Circuit Rule 8(a)(1); Fourth Circuit Rule 17; Fifth Circuit Rule 13.6.1; Seventh Circuit Rule 5(b); Eighth Circuit Rule 1(b); Ninth Circuit Rule 13(b)(3) (formerly Rule 13(e)); Tenth Circuit Rule 8(c)(8); and Eleventh Circuit Rule 22(f)(2). The Second, Third and Sixth Circuits do not have any rules requiring submissions identifying all interested persons.

[9] No review for possible disqualification as a result of ownership of stock in absent class members was done before certiorari was granted in *Weyerhaeuser Company* v. *Lyman Lamb Company*, No. 81-1618 and *Georgia-Pacific Corp.* v. *Lyman Lamb Company*, No. 81-1619 last term. See *e.g.*, *Weyerhaeuser Company* v. *Lyman Lamb Company*, No. 81-1618 and *Georgia-Pacific Corp.* v. *Lyman Lamb Company*, No. 81-1619, ____ U.S. ____ 102 S.Ct 2232 (1982), *granting cert. sub nom. In Re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981). However, based on the 1982 financial statement of Chief Justice Burger, it is apparent that he is a stockholder in the Edward Hines Lumber Company which may be a *Plywood* class member. Justices White and O'Connor have already recused themselves and further evaluations based on an examination of the class list may reveal that there is no quorum to review Nos. 81-1618 and 81-1619 unless the Ninth Circuit's interpretation of recusal law is rejected.

II.

THIS PETITION PRESENTS AN IMPORTANT ISSUE OF FIRST IMPRESSION WHOSE IMMEDIATE RESOLUTION BY THIS COURT IS NECESSARY FOR THE EFFICIENT ADMINISTRATION OF ALL FEDERAL COURTS

Both Chief Judge Muecke and the Ninth Circuit recognized the importance of resolving the question whether stock ownership in a class member mandates the *per se* recusal of a federal judge under section 455. In certifying his opinion for interlocutory review pursuant to 28 U.S.C. § 1292(b), Chief Judge Muecke found that his recusal "involve[d] a controlling question of law as to which there is a substantial ground for difference of opinion. . . ." Appendix C to the petition in No. 82-287. Similarly, the Ninth Circuit, while discussing its election to review Chief Judge Muecke's recusal under its general supervisory authority, repeatedly commented on the gravity of the issue presented here:

> We are concerned with far more than the injury to these particular petitioners; we are concerned, *inter alia,* with the effect of the challenged order on the operation of the courts.

Appendix A at A-9.

> [W]e are faced with the need to resolve a significant question of first impression where the failure to do so may adversely affect the efficient operation of the district courts.

Id. at A-10.

> We believe that the petition in this case presents a new and far reaching question of major importance to the district courts, that the question is likely to continue to evade review and that its resolution would add importantly to the efficient and orderly administration of the district courts. The exercise of our supervisory mandamus authority is appropriate under such circumstances.

Id. at A-12.

> [T]he petition presents a question of law of first impression, the resolution of which would have a substantial effect on the orderly and efficient administration of the courts. . . .

Id. at A-16.

As of June 30, 1982 there were 3,263 class actions pending in United States District Courts.[10] The Ninth Circuit has enunciated a rule of law which, by its own admission, may make judicial disqualifications in such cases "the rule rather than the exception." Appendix A at n. 18. Currently there are no procedures established in any circuit (including the Ninth Circuit) for the practical implementation of *per se* recusals based upon stock ownership in class members.

As a result of the ethical responsibility of members of the judiciary to examine potential conflicts *sua sponte*, the issue presented by this petition will arise repeatedly in all pending and future class actions. For example, this issue is raised as a threshold question in the petition in No. 82-287, even though that petition concerns jurisdictional rulings by the Ninth Circuit.[11] The same issue is present, albeit "behind the scenes", in the *Plywood* litigation, Nos. 81-1618, and 81-1619, and will arise in all other class actions which come before this Court. The general importance of the issue presented here to the federal judiciary makes it appropriate that the question of recusal for stock ownership in an absent class member be resolved by this Court to insure the consistent application of section 455 in all federal class actions.

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[10] See, 1982 Annual Report of the Director of the Administrative Office of the United States Courts, Table 33.

[11] If a single share of stock in an absent class member is a disqualifying interest, this Court would not be able to grant or deny the petition in No. 28-287 or decide the preliminary procedural motion for relief from the Rules filed concurrently therewith. Under 28 U.S.C. § 2109, this Court must affirm lower court judgments when a quorum of six Justices (28 U.S.C.§ 1) cannot be convened. Applying the Ninth Circuit's ruling to this Court in the *Cement* litigation results in the recusal of five Justices, thereby precluding a quorum and preventing consideration of the petition. The Justices' 1982 financial disclosure statements shows that Chief Justice Burger owns stock in Minnesota Mining & Manufacturing, Corp., Honeywell, Inc. and Edward Hines Lumber

(Footnote continued on next page)

III.

THE NINTH CIRCUIT'S INTERPRETATION OF 28 U.S.C. § 455(b)(4) GOES BEYOND THE STATED INTENT OF CONGRESS AND WOULD DISRUPT THE ORDERLY LITIGATION OF CLASS ACTIONS

Both Chief Judge Muecke and the Ninth Circuit noted that the legislative history of 28 U.S.C. § 455(b)(4) contains no expression of congressional intent as to whether stock ownership in absent class members should be treated like stock ownership in parties. Thus, the Ninth Circuit's ruling that class members and parties should be treated identically for recusal purposes is, in reality, a supposition of what Congress might have done if it had thought about the issue. Surprisingly, the Ninth Circuit concluded that Congress would have done something which is both impractical and disruptive of class litigation, and contrary to several of the stated purposes for establishing a *per se* recusal rule.

The Ninth Circuit observed that the *per se* recusal rule was applied to interests in parties to eliminate the need for deciding whether an interest was substantial. However, two equally important congressional considerations were the avoidance of uncertainty in recusal matters and the disqualification of judges at the outset to minimize disruption to litigation. The legislative history of section 455 unequivocally demonstrates that Congress drafted the *per se* recusal rule to apply to stockholdings in entities of record which can be easily identified. As stated during the Senate Judiciary subcommittee hearings on section

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(Footnote continued from previous page)

Co.; Justice Blackmun owns stock in Minnesota Mining & Manufacturing, Corp., IBM, J.C. Penny, and Coca Cola; Justice Powell in Ethyl Corp., Proctor & Gamble, and Caterpillar Tractor; Justice Rehnquist in Southern California Edison; and Justice O'Connor in Eastman Kodak and Nalco Chemical Corp., all of which appear on the Master Class List. Justice O'Connor also appears to be disqualified under 28 U.S.C. § 455(b)(5)(ii) because of her spouse's former membership in a law firm representing a number of respondents and defendants herein. As is true with the petition in No. 82-287, the underlying issue of this petition (i.e., is a class member a "party" under section 455) must be decided as a prerequisite to the decision to accept jurisdiction to review the Ninth Circuit's opinion.

455, the intent was not to "put judges in the position of where they cannot have stock at all," since, "as a practical matter," a judge would simply "have his portfolio . . . check[ed] . . . against the record" and disqualify himself if any company in which he owned stock appeared.[12] The following description of how such disqualifying interests were to be ascertained appears in the legislative history of the Financial Disclosure Act, 28 U.S.C. Appendix I § 301, *et. seq.*:

> [A] procedure may be established by which *an attorney . . . may submit* to the clerk of the court, *at the time of filing the case* or thereafter, *a list of parties* and interests which he believes may be substantially affected by the outcome of the litigation. The clerk will then . . . indentify those parties and interests, if any, in which the judge has a financial interest as reflected in his filed disclosure statements.[13] (Emphasis added.)

While such procedures have been established, none of them are designed to accommodate a situation where it is impossible to know the identity of the "parties" to a proceeding until after the district court has: (1) ruled on the propriety of class certification, (2) settled upon a final class definition and form of notice, (3) ordered notice disseminated, (4) set a deadline for requesting exclusion from the class, and (5) determined whether those persons and entities not requesting exclusion actually qualify for class membership. Frequently this final step is not completed until claims are processed at the conclusion of the litigation.

As a practical matter, the nature of class action suits often results in the identity of individual class members *never* actually coming to the judge's attention. All of the administrative

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[12] Hearings on S. 1064 Before the Subcomm. on Improvements on Judicial Machinery of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess., at 36. (1971) (hereinafter cited as "Senate Subcommittee at ").

[13] Hearings on H.R. 1, H.R. 9, H.R. 6954 and Companion Bills Before the Subcomm. on Administrative Law and Governmental Relations of the House of Representatives Comm. on the Judiciary, 95th Cong., 1st Sess., at 488-489 (1977).

aspects of compiling the class list and processing claims are handled by the lawyers. Accordingly, as was the case with Chief Judge Muecke, counsel and not the Court may control the information which triggers disqualification for an interest in a class member.

The question of when ownership of stock in putative class members ripens into a disqualifying interest is further complicated by the fact that a judge's holdings may change during the course of litigation.[14] If recusal turns upon class membership being finally fixed, it will almost certainly occur well into the litigation. A judge with an active portfolio could own stock in certain class members, sell that stock and buy stock in other class members many times before that occurred. Presumably this would mean that he or she would have a disqualifying interest at certain times and not at others, probably without even being aware of the situation.

This, of course, raises the additional question of the finality of the judge's pre-recusal decisions. Chief Judge Muecke had entered seventy-five pretrial orders, including certification of the *Cement* classes, before the opt-out period closed and defendants informed him that at least one of the entities in which Mrs. Muecke owned stock made purchases which qualified it for class membership. It certainly can be anticipated that any new judge may be confronted with motions to vacate all or some of those orders on the grounds that the issues were decided by a judge with a disqualifying interest in a party.

Despite the Ninth Circuit's view that "Congress' main concern in adopting section 455 was to promote public confidence in the impartiality of the judiciary" (Appendix A at A-29), it does not follow that had Congress considered whether class members should be treated as parties for recusal purposes

[14] The real parties in interest argued in their opposition to the petition in No. 28-287 that the mere fact that certain Justices' financial statements ("current only as of December 31, 1981") show stock ownership in *Cement* class members does not necessarily mean that "any Justice . . . [will] ha[ve] such a shareholding . . . at the time the recusal issue is properly presented. . . ." Opposition at n.18. Ascertaining when the recusal issue is properly presented may well be more difficult in district courts than in this Court.

it would have totally sacrificed the benefits of promoting the efficient administration of the courts by applying per se disqualification to interests which are neither apparent from the pleadings nor easily identifiable. Congress enacted a per se recusal rule which is "practical enough to be livable."[15] It is simply not logical to presume that it would have intentionally extended that recusal rule in a manner to bring down upon the judiciary the chaos which both Chief Judge Muecke and the Ninth Circuit found results from the automatic recusal of judges who own a single share of stock in an absent class member.

In reality, to apply section 455 to stockholdings in class members defeats Congress' intention that disqualification be controlled by the judiciary and occur at the outset of litigation. Yet, to achieve those goals under the Ninth Circuit's ruling, an even more restrictive rule must emerge—*per se* disqualification for stock ownership in *potential* class members. In order to return control over the early determination of recusal to the courts, the first activity in a newly filed class action will have to be the assembling of a list of all potential class members who can be identified with reasonable effort. That list would then be compared to the judge's financial disclosure statement. The possibility that any such entities might opt-out if the class is certified, or that the class might not be certified, would have to be ignored. In large class actions this effort will require a sizable expenditure of time and money regardless of whether the action is ultimately certified to proceed as a class action. Furthermore, unnecessary recusals will occur where the class is not allowed or where the disqualifying entity opts-out or cannot prove class membership. In multidistrict litigation such a list would have to be submitted to the Judicial Panel for use in (A) ascertaining its ability to act, and (B) selecting a transferee forum. If the experience of this case is any indication, it is probable that there will be litigation which the Judicial panel may be unable to assign.

When Congress said "party to the proceeding" it meant the persons identified in the claims and counterclaims, who had hired lawyers and were actively engaged in litigation. Those

[15] Senate Subcommittee at 37.

persons are identifiable from the pleadings, which provide a workable method for determining disqualifying interests. Petitioners do not suggest that an interest in a class member may never require recusal or that such interests are not covered by section 455. Congress wrote a provision applicable to interests other than those in parties or the subject matter in controversy, and it is under that provision for "other interest[s]" that stock ownership in absent class members properly falls.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: October 15, 1982.

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re CEMENT ANTITRUST LITIGATION
(MDL No. 296)

STATE OF ARIZONA, *et al.*,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
Respondent,

KAISER CEMENT & GYPSUM CORPORATION, *et al.*,
Real Parties in Interest.

No. 81-7465

OPINION

On Petition for Writ of Mandamus
United States District Court for the District of Arizona
Honorable Carl A. Muecke, District Judge, Presiding

Argued and Submitted: January 4, 1982

BEFORE: FERGUSON, NELSON AND REINHARDT, Circuit Judges

REINHARDT, Circuit Judge

Plaintiffs seek a writ of mandamus directing the district court to vacate its opinion and order in which Judge Muecke granted the defendants' motion to recuse himself pursuant to 28 U.S.C. § 455(b)(4) (1976). *In re Cement and Concrete*

Antitrust Litigation, 515 F.Supp. 1076 (D. Ariz. 1981). Petitioners request that we issue the writ pursuant to our supervisory authority under the All Writs Act, 28 U.S.C. § 1651 (1976). We have previously dismissed plaintiffs' appeal from Judge Muecke's order for lack of jurisdiction under 28 U.S.C. § 1291 (1976) and have denied plaintiffs' petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) (1976). *In re Cement Antitrust Litigation*, 673 F.2d 1020 (9th Cir. 1982). In our opinion we concluded, however, that the petition for a writ of mandamus would be reviewed on the merits. *Id.* at 1025. We now do so under our supervisory authority to insure the proper and orderly administration of the federal judicial system. *See Schlangenhauf* v. *Holder*, 379 U.S. 104 (1964); *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957).[1]

I.

HISTORY OF PROCEEDINGS

Beginning in 1976, twenty-one separate actions were filed in federal district courts in Arizona and California alleging a conspiracy among various cement and concrete producers to fix the price of cement and concrete in violation of the antitrust laws. On September 12, 1977, the Judicial Panel on Multi-District Litigation transferred those actions to the Central District of Arizona and assigned the cases to the Honorable C. A. Muecke for coordinated or consolidated pretrial procedures. *In re Cement and Concrete Antitrust Litigation*, 437 F.Supp. 750 (J.P.M.D.L. 1977). The Panel on Multi-District Litigation cited Judge Muecke's familiarity with the litigation as one of the reasons for transferring the case to the District of Arizona. *Id.* at 753.

Early in 1979, Judge Muecke certified a nationwide class of public and private cement producers and two statewide governmental entity classes. The parties lodged with the court a master class list that contained the names of 210,235 putative class members who could be identified with reasonable effort.

[1] Courts and commentators have referred to the use of mandamus to exercise supervisory authority over the district courts as "supervisory mandamus." *See, e.g., Bauman* v. *United States District Court*, 557 F.2d 650 (9th Cir. 1977); 9 J. Moore, *Moore's Federal Practice* ¶ 110.28 at 312 (2d ed. 1982).

Judge Muecke actively presided over the pretrial proceedings through January of 1981, during which time he entered over 75 pretrial orders, ruled on countless motions, supervised the substantial completion of the discovery process, approved the master class list, and gave notice to class members that they could opt out of the class by written request prior to December 31, 1980.

On January 12, 1981, several of the defendants advised Judge Muecke by letter that a comparison of his 1980 financial disclosure report with the names on the master class list revealed that Judge Muecke's wife owned stock in seven of the 210,235 class members. The defendants asserted that the judge was under a *per se* obligation to recuse himself pursuant to 28 U.S.C. § 455(b)(4) and Canon 3(C)(1)(c) of the Code of Judicial Conduct. Judge Muecke ordered the parties to brief the question and heard oral argument on two occasions.

Judge Muecke also requested an advisory opinion from the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States. The Committee responded by suggesting that Judge Muecke should disqualify himself because (1) his wife had a financial interest in the subject matter of the proceeding within the meaning of section 455, (2) his wife's interests could be substantially affected by the outcome of the proceeding within the meaning of Canon 3 of the Code of Judicial Conduct, and (3) his continued handling of the case could create the appearance of impropriety in violation of Canon 2 of the Code of Judicial Conduct. 515 F.Supp. at 1083-84. *See also* Advisory Comm. on Judicial Activities, *Disqualification in Class Actions,* Advisory Op. 68 (1981).

Judge Muecke recused himself in an opinion and order, 515 F.Supp. at 1076. The judge did not reach the issue of whether he had a financial interest in the "subject matter" of the proceeding, but rather, based his order of recusal on his conclusion that his wife's stock constituted a financial interest in a "party" to the proceeding within the meaning of 28 U.S.C. § 455(b)(4) (1976). In his opinion and order of recusal, Judge Muecke made it clear that the sole reason he disqualified himself was because he believed that section 455 imposed a *per se* rule of recusal in such circumstances:

> I must admit that my first reaction to [respondents'] position recalled the words of Mr. Bumble in Dicken's Oliver Twist: "If the law supposes that . . . the law is an ass—an idiot."
>
> . . . I have concluded [,however,] that I must recuse myself, not because I feel a sense of conflict, and not because I feel that to continue would create the appearance of impropriety. I have concluded that I must recuse myself for the sole reason that the law, as written, says I must.

515 F.Supp. at 1078 (footnote omitted). Judge Muecke further indicated that he was willing and able to continue handling the multidistrict proceeding and that he would have done so were it not for section 455. *Id.* at 1081. Judge Muecke certified his order of recusal for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1976).

Plaintiffs have sought review of Judge Muecke's recusal order through three avenues: (1) an appeal pursuant to 28 U.S.C. § 1291; (2) a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b); and (3) a petition for a writ of mandamus requesting this court to exercise its supervisory authority over the district courts pursuant to 28 U.S.C. § 1651. Although we dismissed the appeal under section 1291 and denied permission to appeal under section 1292(b), we noted that where a party claims exceptional circumstances, such as major disruption of the litigation resulting from an order of recusal, the party may seek a writ of mandamus in the court of appeals. In deciding to review the petition on the merits, we said, "[i]t is for just such an exceptional circumstance that the writ was designed." 673 F.2d at 1025.

II.

BAUMAN REVISITED

A. Introduction

In reviewing petitioners' request for a writ of mandamus, we are guided by the principles collected and distilled in *Bauman* v. *United States District Court*, 557 F.2d 650 (9th Cir.

1977). In *Bauman,* we expressed our concern over the unprincipled use of the writ as a means of wresting control of litigation from the district courts merely because appellate judges disagree with interlocutory rulings of the district courts or are sympathetic to arguments made in support of petitions. Such unrestrained use of mandamus would undermine the mutual respect that is an indispensable element of the relationship between federal trial and appellate courts and would "subvert the policies underlying the finality rule, 28 U.S.C. § 1291, or the carefully limited congressional scheme governing interlocutory appeals . . . . " *Id.* at 653.

In order to confine the use of mandamus to its proper office, we enunciated five general guidelines in *Bauman* to assist in the determination of whether mandamus is the appropriate remedy in a particular case. The guidelines are: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he desires; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests persistent disregard for the federal rules; and (5) whether the district court's order raises new and important problems or issues of law of first impression. *Id.* at 654-55. Related considerations include: whether the injury alleged by petitioners, although not correctable on appeal, is the kind that justifies invocation of our mandamus authority; whether the petition presents an issue of law which may repeatedly evade appellate review; and whether there are other compelling factors relating to the efficient and orderly administration of the district courts.

As we noted in *Bauman,* the guidelines are cumulative and may not all point to the same conclusion. *Id.* at 655. Moreover, all of the guidelines are unlikely to be met in any one case. Some are more relevant to particular categories of cases than others. Certain concepts relating to the traditional use of mandamus are not necessarily applicable in supervisory mandamus cases, or, at the least, are applied differently. The guidelines are not susceptible of mechanical application; they are not meant to supplant reasoned and independent analysis

by appellate courts. In sum, the guidelines serve only as a useful starting point, an analytic framework for determinations regarding the propriety of mandamus relief.

B. The Availability and Adequacy of Other Relief and the Nature of the Harm Required for Mandamus Relief.

The first two criteria articulated in *Bauman* are designed to insure that mandamus, rather than some other form of relief, is the appropriate remedy. The petitioners must demonstrate that they have no other adequate means of obtaining the relief desired and that they will be damaged in a way not correctable on appeal from final judgment. There is another consideration as well: the injury must be the kind that warrants the invocation of the extraordinary remedy of mandamus.

The relief sought by petitioners is a writ directing Judge Muecke to vacate his order of recusal so that the able judge, who has an extensive working knowledge of this complex litigation, may continue to preside over the consolidated pretrial proceedings. Petitioners thus hope to avoid the inevitable costs and delay that would result from the assignment of a new judge, and seek to prevent the loss of Judge Muecke's unique working knowledge of this case. We have already denied petitioners' request to review the order of recusal under 28 U.S.C. § 1291 (direct appeal of collateral order), and 28 U.S.C. § 1292(b) (discretionary interlocutory appeal). 673 F.2d 1020. While we may be free to reconsider that decision, we decline to do so.

We do not think it would be proper to reconsider here a decision we so recently announced unless new circumstances had intervened or our earlier decision was indisputably or patently erroneous. Otherwise, we would simply be substituting the views of the individual members of this panel for the judgment of the majority of our colleagues on the panel that heard the matter previously. Therefore, while we are impressed by the well reasoned and persuasive dissent of Judge Boochever, and believe that the views he expressed have substantial merit, we conclude that petitioners' avenues of interlocutory appeal from the recusal order must remain closed.

We next consider whether a post-judgment appeal would provide an effective remedy and thus render the exercise of our mandamus authority inappropriate. Although it has been stated that "disqualification questions are fully reviewable on appeal after final judgment," *In re Corrugated Container Anti-Trust Litigation,* 614 F.2d 958, 960-61 (5th Cir.), *cert. denied.* 449 U.S. 888 (1980), a review of the authorities indicates that a more accurate statement of the law is that an order *denying* a motion for disqualification is reviewable on appeal after final judgment. *See, e.g., Berger* v. *United States,* 255 U.S. 22 (1921); *Potashnick* v. *Port City Construction Co.,* 609 F.2d 1101 (5th Cir. 1980) *cert. denied,* 102 S. Ct. 1256 (1982); *SCA Services* v. *Morgan,* 557 F.2d 110 (7th Cir. 1977); *Los Angeles Trust Deed & Mortgage Exchange* v. *SEC,* 285 F.2d 162 (9th Cir. 1960), *cert. denied,* 366 U.S. 919 (1961); 9 J. Moore, *Moore's Federal Practice* ¶ 110.13[10] at 187 n.1 (2d ed. 1982); C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure,* § 3553 at 384 (1975); Comment, *Disqualification For Interest of Lower Federal Judges,* 71 Mich. L. Rev. 533, 547 (1973).

It is, of course, possible that petitioners could seek to challenge the recusal order after final judgment has been entered, but no such review could prevent the damage that petitioners allege they will suffer or afford effective relief therefrom. Despite the fact that the petitioners may suffer tremendous disruption, unreasonable delay, additional cost, and the loss of Judge Muecke's valuable experience, a post-judgment reversal on appeal could not provide a remedy for those injuries. Moreover, whatever collateral injuries petitioners suffer will have been incurred even if they prevail fully at trial and thus have no right to appeal from the final judgment.

Equally important, when a trial judge enters an order *granting* a motion for disqualification the error, if any, cannot serve as a basis for reversal on appeal. *In re Cement Antitrust Litigation,* 673 F.2d at 1025. A party cannot ordinarily predicate a claim of prejudicial error on the fact that he was required to try his cause before one judge who was duly qualified to preside rather than another. Prejudicial error does not occur simply because a particular judge fails to handle a

case or some other judge does; the mere assignment of a matter to a judge does not affect the outcome of the case. It is the conduct of the judge in conducting the proceeding that gives rise to error which is prejudicial and requires reversal, not the assignment of the case to the judge.[2] Thus, despite the fact that an erroneous order of recusal may cause collateral injury to the party, the error is harmless for purposes of Federal Rule of Civil Procedure 61; therefore it does not constitute prejudicial or reversible error. *See Hampton* v. *City of Chicago,* 643 F.2d 478, 480 n.7 (7th Cir. 1981); *Kelly* v. *Metropolitan Board of Education,* 479 F.2d 810, 811 (6th Cir. 1973) (McCree, J., concurring).

We conclude that petitioners have no effective right of appeal and will be damaged in a way not correctable on appeal from final judgment. However, we must also consider the question whether petitioners have alleged the type of injury necessary to justify invocation of the mandamus remedy. In another context we stated that "[w]e have consistently rejected petitioners' position that the costs of trying massive civil actions render review after final judgment inadequate." *In re Sugar Antitrust Litigation,* 559 F.2d 481, 484 (9th Cir. 1977) (denying mandamus relief from an order certifying class).

There are, of course, limits to the hardships which litigants will be forced to bear as a result of erroneous interlocutory orders, even in traditional mandamus cases. In *Varsic* v. *United States District Court,* 607 F.2d 245 (9th Cir. 1979), we granted a petition for a writ of mandamus where the plaintiff was proceeding *in forma pauperis* and the district court erroneously transferred his case from the Central District of California to the Southern District of New York. Despite the fact that the transfer order was fully reviewable on appeal after final judgment, we found that plaintiff would suffer "peculiar hardship" and stated that

> assuming that Varsic loses in the Southern District of New York, but successfully appeals the transfer order in the Second Circuit, he will again be *severely prejudiced.* The

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[2] We do not intend to foreclose the issue of whether prejudicial error could arise where an invidious purpose underlies the assignment of a case to a particular judge. However, under the assignment system used in most, if not all, of the district courts in this circuit, such an issue is unlikely ever to arise.

> impact of the *inevitable delay* which would result from a second trial in the Central District of California following the appeal in the Second Circuit, on a person in his situation, would not be correctable on appeal.

Id. at 252 (emphasis added).

The principal damage that petitioners contend they will incur as a result of the recusal order is additional cost and unreasonable delay. Although the disruption of the proceedings may not prejudice petitioners to the same degree as the change of venue would have prejudiced Varsic, it appears that the recusal order will significantly impair the progress of this litigation. Nevertheless, we believe that there is a substantial question as to whether petitioners have demonstrated the kind of injury that would be necessary to justify the invocation of our mandamus authority in a traditional mandamus case.

Here, however, we are reviewing the petition pursuant to our supervisory mandamus authority. We are concerned with far more than the injury to these particular petitioners; we are concerned, *inter alia*, with the effect of the challenged order on the operation of the courts. Petitioners' contend that the recusal order will have a major disruptive effect on the administration of justice in the district of Arizona or any other district to which the litigation may be transferred.[3] Moreover, they contend that the resolution of the legal question will, for reasons we consider below, add importantly to the efficient operation and administration of the district courts throughout this circuit. Under these circumstances, the degree of injury to petitioners is a less critical factor. We believe that in supervisory mandamus cases, as long

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[3] Our previous decision in *In re Cement Antitrust Litigation*, 673 F.2d 1020 (9th Cir. 1982), does not foreclose petitioners' contention that the recusal order will have a significant adverse impact on both the progress of this litigation and the orderly and efficient administration of the federal courts in general. Although we strongly suggested in *Cement* that petitioners' failed to demonstrate that the recusal order would substantially delay the proceedings, we stated that the contention would be reviewed in our consideration of the merits for the petition for mandamus:

> [I]f dissatisfied with the district judge's decision and confident that the litigation will be greatly disrupted, a party may seek a writ of mandamus from the court of appeals. It is for just such an exceptional circumstance that the writ was designed. Plaintiffs have done so here and that petition will be reviewed on the merits.

Id. at 1025 (citations omitted).

as petitioners have demonstrated that they will suffer an actual injury not correctable on appeal, they have satisfied both the injury requirement and the second criterion in the *Bauman* analysis.

C. Oft Repeated Errors, New and Important Issues of Law, and The Need to Supervise the Administration of the Federal Judicial System

The fourth and fifth factors noted in *Bauman* are whether the district court's order is an oft repeated error, or manifests a persistent disregard of the federal rules, and whether the district court's order raises new and important problems or issues of law of first impression. Here, the fourth factor is absent and the fifth factor is indisputably present. It is unlikely that both of these factors would be present where a petition for mandamus presents a single issue, since one of the factors deals with repeated error while the other deals with questions of first impression.

While the two factors deal with contrasting situations, each for its own reason may implicate the duty of appellate courts to exercise supervisory control of the district courts in order to insure proper judicial administration. *See generally Schlangenhauf* v. *Holder*, 379 U.S. 104 (1964); *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259-60 (1957) ("Supervisory control of District Courts by Courts of Appeals is necessary to proper judicial administration in the federal system."); *Goldblum* v. *National Broadcasting Corp.*, 584 F.2d 904, 906 n.2 (9th Cir. 1978) (mandamus appropriate for the exercise of supervisory control of district courts necessary to proper judicial administration); 9 J. Moore, *Moore's Federal Practice* ¶ 110.28 at 312 (2d ed. 1982).

In the present case, it is the fifth *Bauman* factor that implicates our supervisory mandamus authority: we are faced with the need to resolve a significant question of first impression where the failure to do so may adversely affect the efficient operation of the district courts. *See Schlangenhauf* v. *Holder*, 379 U.S. 104, 111 (1969) ("[I]ssue of first impression that

called for construction of Rule 35 in a new context. . . . Court of Appeals should have also, under these special circumstances, determined the "good cause" issue, so as . . . to settle new and important problems."); *National Right to Work Legal Defense & Education Foundation, Inc.* v. *Richey*, 510 F.2d 1239, 1243 (D.C. Cir.), *cert. denied*, 422 U.S. 1008 (1975) (review by mandamus appropriate "where the decision will serve to clarify a question that is likely to confront a number of lower court judges in a number of suits before appellate review is possible."); 9 J. Moore, *Moore's Federal Practice* ¶ 110.28 at 312-13 (2d ed. 1982) ("The courts of appeals possess the . . . power to supervise the administration of justice by their district courts . . . and they may review immediately questions of unusual importance the determination of which are necessary to orderly, even and efficient administration.").

Exercise of our supervisory mandamus authority is particularly appropriate when an important question of law would repeatedly evade review because of the collateral nature of the issue.[4] *See Colonial Times Inc.* v. *Gasch*, 509 F.2d 517, 524-26 (D.C. Cir. 1975). In *Colonial Times*, the court held that mandamus could issue to correct an error in the discovery order before it. The court noted that the type of issues raised in the case before it, "while important to the general course of the litigation, are often collateral to the litigation and thus lost to appellate review in fact if not in theory." *Id.* at 526. The court stated that mandamus is appropriate "when the appellate court is convinced that resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice." *Id.* at 524.

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[4] Although Judge Muecke's order "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment," *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 375 (1981) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 (1978)), we have previously determined that the order is not appealable under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), because the order does not impair a "claim of right" possessed by plaintiffs. *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1024-25 (9th Cir. 1982).

Similarly, in this case, an important question of first impression will evade review unless it is considered under our supervisory mandamus authority. Moreover, that question may continue to evade review in other cases as well. In cases in which district judges recuse themselves, the orders of recusal will be effectively unreviewable on appeal notwithstanding the injuries to the parties and the possible disruption of the orderly administration of the courts. While it is true that an order denying a motion for recusal might at some later time become the subject of an appeal, it would be contrary to the interest of orderly judicial administration to delay resolution of the important question before us in order to await the occurrence of such a possibility.

We believe that the petition in this case presents a new and far reaching question of major importance to the district courts, that the question is likely to continue to evade review and that its resolution would add importantly to the efficient and orderly administration of the district courts. The exercise of our supervisory mandamus authority is appropriate under such circumstances.

D. The "Clearly Erroneous as a Matter of Law" Standard

Whether Judge Muecke's recusal order is clearly erroneous as a matter of law involves a pure question of statutory construction. The meaning of the "clearly erroneous as a matter of law" standard of review is elusive at best, but especially so when a question of law of first impression is involved. If a district court were to adopt an interpretation of a statute that squarely contradicted the literal terms and clear intent of the statute, it could readily be said that the interpretation was clearly erroneous. But when a district court is faced with two plausible interpretations of a statute that has not been construed by an appellate court, it would be difficult in one sense to characterize either interpretation as "clearly erroneous". Viewed differently, however, if an appellate court were to review the interpretation adopted by the district court and reject it, that particular interpretation could at that point be said to be "clearly" erroneous. *See United States* v. *Mehrmanesh*, 652 F.2d 766, 773 (9th Cir. 1980) ("If we decide that the

district court was wrong in its reading of [the statute], appellant's right to relief *will* be "clear and indisputable.") (Fletcher, J. dissenting).[5]

We believe that the test set forth by the Supreme Court for determining when a finding of fact is "clearly erroneous" is instructive where a question of law is involved as well. In *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948), the Court stated that under Rule 52(a) of the Federal Rules of Civil Procedure:

> [a] finding [of fact] is "clearly erroneous" when although there is evidence to support [the district court's finding], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Id. at 395. The "firm conviction" test provides a helpful approach to our efforts to determine when a district court's interpretation of a statute falls under the third *Bauman* criterion—"clearly erroneous as a matter of law as that term is used in mandamus analysis," *Bauman*, 557 F.2d at 650. Two of our previous decisions suggest that we will characterize a ruling of a district court on a question of law as "clearly erroneous" only

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[5] Ordinarily mandamus will not issue unless the petitioner can demonstrate that his right to such relief is "clear and indisputable." *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 662 (1978) (plurality opinion). *See also Kerr* v. *United States District Court*, 426 U.S. 394 (1976); *Banker's Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953). In *Hampton* v. *City of Chicago*, 643 F.2d 478 (7th Cir. 1981), the trial judge granted the defendants' motion that he recuse himself pursuant to section 455 on the ground that his impartiality might reasonably be questioned. Plaintiffs' petition for a writ of mandamus to vacate the recusal order was dismissed by the court of appeals with the explanation that "[w]e are not persuaded that a party in like circumstances could ever make a showing that its rights [sic] to issuance of the writ is clear and indisputable." *Id.* at 480.

It may be true that a petitioner can rarely, if ever, demonstrate that his right to relief is "clear and indisputable" where a trial judge has recused himself pursuant to an exercise of discretion under section 455, i.e., if the trial judge has determined that his impartiality might "reasonably" be questioned or that his interest might be "substantially" affected. However, where, as here, the trial judge finds no reason to recuse himself other than one that results from his interpretation of the statute, and the alleged error is thus solely one of law, petitioner may be able to establish a "clear and indisputable" right to relief.

when, after a full review of the authorities, we are firmly convinced that the district court's interpretation was incorrect.[6]

In *Mehrmanesh*, we were unable to determine the meaning of the statute simply from an examination of its language. After considering the limited authorities available, we were of the view that the "question decided below was a close one." *Id.* 682 F.2d at 770-71. We were not firmly convinced, either way,

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[6] The Second Circuit has recently employed a "firm conviction" standard to determine if a trial court's interpretation of a statute was correct. In *In re International Business Machines Corp.*, No. 82-3037, slip op. at 4371 (2d Cir. Aug. 13, 1982), the Second Circuit granted a petition for a writ of mandamus where the trial judge refused to take prompt action to dismiss a major antitrust enforcement action despite the fact that the Department of Justice stipulated to dismissal. The trial judge refused to enter a judgment of dismissal pending his determination of whether the Tunney Act, 15 U.S.C. § 16(b)-(h) (1976), was applicable to the stipulated dismissal.

The court stated: "Essential to IBM's argument that Judge Edelstein has abused his jurisdiction is a firm conviction that the Tunney Act does not apply to . . . stipulation[s] of dismissal." *Id.* at 4389. The court concluded that the language of the statute and its legislative history "compelled" the conclusion that the district court's interpretation of the statute was incorrect. *Id.* at 4394. The Second Circuit also considered whether review by mandamus was appropriate in that case:

> We begin with the recognition that this is an extraordinary case. It has been one of the longest antitrust cases since the enactment of the Sherman Act, and involves one of the nation's largest industrial concerns. The parties in this litigation have seen four changes of Administration with corresponding shifts in civil antitrust policies. With these changes have come dozens of new attorneys. The length of the proceedings is particularly significant because of developments in the industry since the commencement of the action which, practically speaking, have rendered many of the underlying products commercially outmoded. The case also reaches us in a unique context in that both parties seek dismissal. In light of the underlying issue of first impression, *i.e.* whether the Tunney Act applies to Rule 41(a)(1) stipulations of dismissal, the unique nature of this case, the enormous sums of money being expended by the parties in compliance with orders for document retention which the district court will not even consider modifying until it has decided the Tunney Act question, and the length of the proceedings, we have the "extraordinary significance" required to make mandamus an appropriate consideration. *See In re Attorney General*, 596 F.2d 58, 64 (2d Cir. 1979). Accordingly, we proceed to a review of IBM's claims.

Id. at 4388.

In light of the above factors, the Second Circuit issued the writ of mandamus after having found that the district court's interpretation of the Tunney Act was wrong and that the trial judge had therefore abused his jurisdiction in refusing to dismiss the case.

as to what the correct result should be. We concluded, therefore, that "[w]hether or not the district court's interpretation is ultimately upheld on appeal after final judgment, we cannot now find it to be 'clearly erroneous as a matter of law. . . .'" *Id.* (quoting *Bauman* v. *United States District Court,* 557 F.2d 650, 660 (9th Cir. 1977)). In *Varsic* v. *United States District Court,* 607 F.2d 245 (9th Cir. 1979), we also could not determine the meaning of the statute simply from an examination of the language. There we reviewed the legislative history of an Employee Retirement Income Security Act venue provision, compared its language with the language used in the venue provisions of other statutes, and analyzed cases construing those other provisions. After painstaking analysis of these materials and other questions, we said "[w]hile we should be careful in attaching the adverb 'clearly' to erroneous in our hindsight review, we conclude that the test is met here." *Id.* at 252.

In *Mehrmanesh* we found the question close—we were not firmly convinced of the correct answer. In *Varsic,* we ultimately were. In line with the "firm conviction" test, *United States Gypsum,* for determining whether findings of fact are "clearly erroneous," we conclude that: when we are firmly convinced that a district court has erred in deciding a question of law, we may hold that the district court's ruling is "clearly erroneous as a matter of law as that term is used in mandamus analysis," *Bauman,* 557 F.2d at 660.

Moreover, we have some doubt that the district court's order need be "clearly" erroneous in supervisory mandamus cases where the petition raises an important question of law of first impression, the answer to which would have a substantial impact on the administration of the district courts. In cases in which the Supreme Court has reviewed the exercise of supervisory authority by the appellate courts over the district courts, it has not set forth any requirement that the order of the district court be "clearly erroneous" as a prerequisite to the granting of mandamus relief. *See Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964); *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249 (1957); *see also* Note, *Supervisory and Advisory Mandamus Under the All Writs Act,* 86 Harv. L. Rev. 595, 611, 615 & n.86 (1973)

("*Schlagenhauf*... left no room in the area of advisory [supervisory] mandamus for a requirement of degree of error").

The requirement that the petitioner demonstrate that the order of the district court is "clearly" erroneous stems from our desire to avoid interference with the district court's control of the litigation before it. In the normal run of cases, it would be counterproductive for appellate courts to interfere when "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction." *Schlagenhauf*, 379 U.S. at 112 (quoting *Parr* v. *United States*, 351 U.S. 513, 520 (1956)). We are hesitant to declare that a district judge has exceeded his authority[7] unless we are reasonably certain, i.e., "firmly convinced," that he has done so. But in supervisory mandamus cases involving questions of law of major importance to the administration of the district courts, the purpose of our review—and the reason for our correcting an error made by a trial judge—is to provide necessary guidance to the district courts and to assist them in their efforts to ensure that the judicial system operates in an orderly and efficient manner. Accordingly, in such cases we see no legitimate reason for refraining from exercising our supervisory authority where we can determine that an error has been made but cannot, for whatever reason, characterize the error as "clearly" erroneous.

Considering the nature of the issue before us, we believe that petitioners would be entitled to a writ were we to be firmly convinced that the district court was incorrect in its interpretation of section 455. Moreover, in light of the fact that the petition presents a question of law of first impression, the resolution of which would have a substantial effect on the orderly and efficient administration of the courts, we might

[7] Although mandamus is most frequently used where there has been a usurpation of judicial power or a clear abuse of discretion, *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953), mandamus may also be used to "compel [a district court] to exercise its authority when it is its duty to do so." *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976) (quoting *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943)).

issue the writ even were we simply to conclude that the district court was in error.[8]

III.

THE RECUSAL STATUTE

We now turn to the question of the proper interpretation of section 455. Section 455 provides in part that

> (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> . . . .
>
> (4) [When] he knows that he, individually or as a fiduciary, or his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding . . . .
>
> . . . .
>
> (d) For the purposes of this section the following words or phrases shall have the meaning indicated:
>
> (4) "financial interest" means ownership of a legal or equitable interest, however small . . . .
>
> . . . .
>
> (e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for

[8] There is, however, one further question that we would be required to decide. We could not issue the writ unless we concluded not only that Judge Muecke was not required to recuse himself because of "a financial interest . . . in a party," but also that he was not required to do so because of "a financial interest in the subject matter." Although Judge Muecke did not consider the latter issue, it was fully briefed and argued by the parties both before the district court and this court. While we do not ultimately decide the question here, we have no hesitation in concluding, for purposes of our mandamus analysis, that Judge Muecke was not required to recuse himself on the latter ground.

> disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided that it is preceded by a full disclosure on the record of the basis for disqualification.

Another provision of section 455 excludes specified mutual fund investments from the definition of "financial interest." [9]

After the plaintiff class had been certified and the time had run during which class members could opt out, Judge Muecke was notified by the defendants that his wife owned stock in several of the plaintiff class members. The defendants contended that Mrs. Muecke's stock ownership constituted a financial interest in the subject matter in controversy or in a party to the proceeding and that Judge Muecke was under a *per se* duty to recuse himself. After extensive briefing, oral argument, and an opinion from the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States, Judge Muecke recused himself on the ground that his wife's stock ownership constituted a financial interest in a party to the proceeding within the meaning of section 455(b)(4).

In his opinion Judge Muecke correctly noted that in subsection (b)(4) of the statute, the phrase "financial interest in the subject matter in controversy or in a party to the proceeding," unlike the phrase "or any other interest," is not modified by the subsequent phrase "that could be substantially affected by the outcome of the proceeding." Thus, subsection (b)(4) establishes two classes of disqualifying interests: first, "financial interests in the subject matter in controversy or in a party to the proceeding;" these interests require recusal whether or not the outcome of the proceeding could have any effect on the interests; second, "other interests;" these interests require recusal only if they could be substantially affected by the outcome of the proceeding. *See In re New Mexico Natural Gas Anti-Trust Litigation,* 620 F.2d 794, 796 (10th Cir. 1980). An "interest" is disqualifying whether it is held by the judge or his

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[9] Section 455(d)(4)(1) provides that "Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund...."

spouse. The issue before Judge Muecke, then, was whether his wife's stock ownership in several of the class members constituted a financial interest in a party to the proceeding or the subject matter in controversy. If such ownership constituted a financial interest in either, it is irrelevant, for purposes of recusal, whether that interest would be substantially affected by the outcome of the proceeding.

Judge Muecke held that ownership of stock in a class member constitutes a financial interest in a party to the proceeding. In so holding, Judge Muecke rejected the petitioner's arguments that, because the statute does not refer to class members and because general law does not treat class members and parties in an identical fashion, class members are not parties within the meaning of section 455. 515 F.Supp. at 1079.

Judge Muecke acknowledged that congressional silence on the question of the status of class members creates some difficulty in applying the statute:

> Given that § 455 purports to adopt a per se rule regarding disqualification, it is amazing that the statute is not more specific as to when the per se rule would apply. The problems created by the language of § 455 are compounded by a dearth of legislative history on the questions before this Court. Section 455 might operate with some degree of success in the context of simple litigation. When applied to complex multidistrict class actions, however, the statute appears to break down.
>
> . . . .
>
> Despite the proliferation of class-actions in this country, there is no indication that Congress directly considered the question whether "party" under (b)(4) should be read to include "class member."

Id. at 1079.

However, Judge Muecke found unpersuasive petitioners' argument that because general law does not treat class members and parties in an identical fashion for all purposes, class

members are not parties for purposes of section 455. It is true that for certain procedural purposes, class members and parties are not treated identically.[10] But, these differences in treatment are a concession to the nature of class action suits and the purposes of Rule 23: if every class member had to be treated as a party in all circumstances, the purposes of Rule 23 might in some instances be frustrated. Thus, for example, the presence of non-diverse class members will not defeat federal diversity jurisdiction so long as the class representatives and the opposing parties are diverse; *e.g., Freidman* v. *Myers,* 482 F.2d 435 (2d Cir. 1973); *see also Snyder* v. *Harris,* 394 U.S. 332, 340 (1969); 13 C. Wright & A. Miller, *Federal Practice and Procedure* § 1755 at 550 n. 82; some courts have held that class members are not subject to discovery under Fed. R. Civ. P. 33; *e.g., Fischer* v. *Wolfinbarger,* 55 F.R.D. 129 (W.D. Ky. 1971); *Wainwright* v. *Kraftco Corp.,* 54 F.R.D. 532 (N.D. Ga. 1972);[11] and other courts have held that class members should not be treated as parties for purposes of counterclaims under Rule 13; *e.g., Donson Stores* v. *American Bakeries Co.,* 58 F.R.D. 481 (S.D.N.Y. 1973).[12]

Whatever the rule may be with respect to treating class members as parties for certain procedural purposes, it is clear that class members and parties are treated in substantially the same manner in regard to the substantive benefits and burdens of judgment. Thus, Rule 23 provides that any class member who has not opted out shall be included in the judgment,

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[10] However, for other procedural purposes they are. Class members must be given notice of any proposed dismissal or settlement and may personally appear and object at a settlement hearing, *see e.g., Cannon* v. *Texas Gulf Sulfur Co.,* 55 F.R.D. 308 (S.D.N.Y. 1972); *see also* 3 H. Newberg, *Class Actions* § 56606 at 564 (1977); the filing of a complaint on behalf of a class tolls the statute of limitations for all members of the class, *American Pipe & Const. Co.* v. *Utah,* 414 U.S. 538 (1974); and when jurisdiction over a 23(b)(3) class is based on diversity, each member of the class must satisfy the $10,000 amount in controversy requirement, *Zahn* v. *International Paper Co.,* 414 U.S. 291, 294 (1973) ("Each *plaintiff* in a Rule 23(b)(3) class action must satisfy the jurisdictional amount . . . . ").

[11] *Contra Brennan* v. *Midwestern Life Ins. Co.,* 450 F.2d 999 (7th Cir. 1971), *cert. denied,* 405 U.S. 921 (1972).

[12] *Contra Rodriguez* v. *Family Publications Service Inc.,* 57 F.R.D. 189 (C.D. Cal. 1972).

whether favorable or not to the class member, Fed. R. Civ. P. 23(c) (2)-(3); a class member may appeal from an order approving a settlement to which the member objects, *Ace Heating & Plumbing Co.* v. *Crane Co.*, 453 F.2d 30 (3d Cir. 1971); a class member is bound as a party for *res judicata* purposes, *see e.g., Brown* v. *Vermillion*, 593 F.2d 321 (8th Cir. 1979); *Smith* v. *Alleghany Corp.*, 394 F.2d 381 (2d Cir.), *cert. denied*, 393 U.S. 939 (1968); 3B J. Moore, *Moore's Federal Practice* ¶ 23.60 at 23-468; 13 C. Wright & A. Miller, *Federal Practice & Procedure* § 1784 at 178 ("According to traditional *res judicata* notions, a member of a class in a Rule 23 suit is considered to be a party by representation, and will be bound to the same extent as an actual party").

On some occasions, courts have expressly described class members as parties. In *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), the Supreme Court stated "[u]nder the circumstances of this case, . . . the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue." *Id.* at 550-51. The Court held that the statute of limitations was tolled for "all members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. Similarly, in comparing the status of members of an organization that had filed suit to the status of class members in a class action, the Seventh Circuit stated that "the [Supreme] Court's remarks plainly imply that the organization's members are not parties to an organizational representative suit. Yet class members are parties to class actions. *See e.g., Zahn* v. *International Paper Co.*, ... " *Local 194, Retail, Wholesale & Department Store Union* v. *Standard Brands*, 540 F.2d 864, 867 (7th Cir. 1976).[13]

We need not decide the general question whether class members are in fact "parties" to a class action suit; for some purposes they are treated as such, and for other purposes they are not. Here, we need decide only if, for purposes of section

[13] *Cf. Greenfield* v. *Villager Industries, Inc.*, 483 F.2d 824, 831 (3rd Cir. 1973).

455, stock ownership in a class member constitutes an interest in "a party to the proceeding." We agree with Judge Muecke's analysis in rejecting petitioner's argument that class members are not parties within the meaning of section 455:

> The problem with plaintiffs' argument is that, *where it counts,* class members and parties are identical. There is no question that class members are included in the benefits and burdens of a judgment on an equal basis with parties. For this reason, there appears to be no reason in logic why a financial interest "however small" in a named party to a litigation should be grounds for recusal, but that the same interest in a class member should not be. Neither the degree of conflict, nor the appearance of impropriety is altered by a litigant's classification as "party" or "class member."

515 F. Supp. at 1079.[14]

A review of the statute's legislative history adds considerable support to Judge Muecke's ruling that, because the appearance of impropriety is similar whether the interest is in a named party or a class member, class members should be viewed as parties for purposes of recusal under the statute.

Prior to its amendment in 1974, section 455 provided that

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest . . . or is so related or connected with any party or his attorney as to render it improper, in his opinion, to sit on the trial, appeal or other proceeding therein.

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[14] We agree with Judge Muecke's analysis to the extent that it stands for the proposition that there is no logical basis for excluding "class member" from the definition of the term "party" as Congress meant that term to be defined when it last amended section 455. We do not understand his analysis to suggest, nor would we necessarily agree, that there is no logical or rational basis for drawing a distinction between ordinary civil cases and class actions for purposes of *enacting* appropriate statutory recusal provisions. Indeed, after asserting that there was "no reason in logic" for drawing such a distinction, Judge Muecke went on to point out several reasons why the application of section 455 to class actions creates substantial administrative burdens which do not occur when ordinary civil cases are involved. 515 F. Supp. at 1080-81. These arguments constitute "reasons in logic" for drawing such a distinction and we consider them *infra.*

The movement to amend section 455 was "spurred by the ambiguities and uncertainties" of the above language. 120 Cong. Rec. 36268 (1974)(statement of Rep. Kastenmeier). Representative Kastenmeier, the House sponsor of the bill to amend section 455, pointed to two main problems under the statute prior to its amendment. First, the statute provided no guidance on the question of how to determine the substantiality of a judge's interest in a party; second, the sole arbiter of the question of the subtantiality of the judge's interest was the very judge whose impartiality was being questioned. *Id.* The House Judiciary Committee described the purpose of the amendment as follows: "[B]y setting specific standards, Congress can eliminate the uncertainty and the ambiguity arising from the language in the existing statute and will have aided the judges in avoiding possible criticism for failure to disqualify themselves." H.R. Rep. No. 1453 at 6, 93rd Cong. 2d Sess. 1974; *reprinted in* 1974 U.S. Code Cong. & Ad. News 6351, 6355 [hereinafter cited as House Report].

At the time that Congress was considering the merits of the amended version of section 455, the American Bar Association (ABA) had adopted a new Code of Judicial Conduct. Canon 3(C)(1) of the ABA Code provided that

> A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where
>
> . . . .
>
> (c) he knows that he, individually or as a fiduciary, or his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding.

"Financial interest" was defined in the new code as a "legal or equitable interest, however small . . . ." *Id.*, Canon 3(c)(3).

Although recusal is required under the ABA Code of Judicial Conduct where the judge has a financial interest in a party, however small, Canon 3(D) of the Code specifically provides that the parties may waive this ground for recusal if they agree in writing that the interest is insubstantial and the

judge discloses the basis of his disqualification on the record.[15] The Reporter for the ABA committee which formulated the Code explained why the committee adopted a waiver provision: "Because of the hardship to the litigants that could be brought about in some jurisdictions by the delay in obtaining another judge to replace a disqualified judge, the Committee decided that under specified circumstances a judge's disqualification based on economic interest . . . could be waived." E. Thode, *Reporter's Notes to the Code of Judicial Conduct* 71 (1973).

The proposed amendment to section 455 was cast in terms very similar to Canon 3(C) of the ABA Code of Judicial Conduct. Indeed, one of the stated purposes of the amendment was to bring the statutory requirement of recusal into line with the ethical obligation imposed by the newly adopted ABA Code of Judicial Conduct. 120 Cong. Rec. 36269 (1974). However, there were significant differences between the ABA Code of Judicial Conduct and the proposed amendment to section 455. The most notable difference was the absence from the proposed amendment of a waiver provision similar to that contained in Canon 3(D). This difference was the subject of much of the congressional debate about the amendment and was the source of most of the opposition to the enactment of the new section 455.

The absence of a provision allowing waiver of a ground for disqualification by the parties when a judge holds an insubstantial interest in a party led to criticism from several quarters. The Judicial Conference of the United States expressed its disapproval of the proposed amendment. The Judicial Conference took the position that the amendment to section 455 was unnecessary in light of its recent adoption of a new judicial code. In addition, it objected to the fact that the

[15] At the time Congress was debating the amendments to section 455, the Judicial Conference of the United States had adopted the ABA Code of Judicial Conduct with some minor changes. Although the ABA Code of Judicial Conduct required the finding that the interest be insubstantial before the parties could agree to waive the ground for disqualification, the Code as adopted by the Judicial Conference did not require any such finding. Rather, the parties were permitted to waive the ground for disqualification even where the judge's financial interest was substantial.

proposed amendment did not allow waiver of disqualification when the judge's interest was insubstantial. The Judicial Conference expressed the view that a waiver provision would be in the best interests of the litigants and the administration of justice. House Report at 10-12; 1974 U.S. Code Cong. & Ad. News at 6360-61.[18]

A number of members of Congress objected to the inflexible nature of the proposed amendment. Representative Dennis of Indiana condemned the proposal as "unreasonable and unrealistic" because it lacked a waiver provision. He pointed to the possible adverse consequences both before the House Judiciary Committee and on the floor of the House:

> The necessary effect of this inflexible provision is that, by legislative enactment, we could have a true Daniel come to judgment—or a Learned Hand upon the bench—and if the case involved, let us say, the Exxon Corporation, and the judge owned 20 shares of common stock, which he had inherited from his parents many years before and had never particularly thought of since, he absolutely could not sit, even though both parties to the cause preferred him—because of his expertise, learning, and integrity—to any and all other available members of the judiciary.
>
> To me, an inflexible provision of this kind does not make good sense, does not make for the highest quality of justice, and represents an over-reaction to a problem which, so far as the Committee has been advised, is largely non-existent.

House Report at 15; 1974 U.S. Code Cong. & Ad. News at 6363. *See also* 120 Cong. Rec. at 36269.

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[18] The Department of Justice suggested that a ground for disqualification should be deemed to be waived if it is not asserted in a timely manner. In a letter to the House Judiciary Committee, the Department of Justice stated that a provision should be added to the proposed amendment requiring that "applications for disqualification . . . be timely made so as to prevent applications from being filed near the end of a trial when the underlying facts were known long before. The Department of Justice recommends enactment of this legislation, amended as suggested above." House Report at 9; 1974 U.S. Code Cong. & Ad. News at 6358. The Justice Department's views evinced concern that the mandatory disqualification procedure might be used by disgruntled litigants to disrupt trials after considerable judicial resources had been invested in the proceedings.

Representative Smith of New York noted that the "American Bar Association generally supports the bill, but feels that the disqualification for any financial interest is unreasonable." He also raised concerns over the possible effect such a sweeping rule of disqualification could have on the federal judiciary. After arguing in favor of a waiver provision, he stated:

> I think this is very important in these days when judicial manpower in our Federal courts to which this will apply is being pushed to the outer limits, because in case after case in which the judge may have a very slight financial interest, as defined in the bill, the judges will not be able to sit and must under the bill disqualify themselves, even if the parties would like to have them sit.

120 Cong. Rec. at 36270.

Nevertheless, despite repeated objections to the lack of a provision allowing waiver where the judge's interest was insubstantial, Congress refused to follow the lead of the ABA and the Judicial Conference on this point. The Senate passed the bill after Senator Burdick, Chairman of the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary and sponsor of the bill in the Senate, told that body that "[t]he most significant provision in these new standards would require a judge to disqualify himself in any case in which he has a financial interest, however small, in the proceeding." 119 Cong. Rec. at 33029 (1973) (remarks of Senator Burdick). Senator Burdick stressed the fact that the proposed amendment deviated from the ABA code in that the amendment did not allow for waiver of either financial interest or kinship within the third degree as grounds for disqualification. Senator Burdick explained that "[t]he rationale . . . [for not allowing waiver] is that these are . . . instances in which the public at large would feel a judge most certainly should disqualify himself." *Id.* at 33030.

The House Judiciary Committee specifically noted that the ABA Code of Judicial Conduct allowed waiver where the judge had only a small financial interest in a party, whereas the proposed amendment to section 455 did not. The Committee

explained that "[w]hile the ABA canon on disqualification would permit waiver in these . . . instances, the committee believes that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver . . . . The statutes contain ample authority for chief judges to assign other judges to replace either a circuit judge or district court judge who become disqualified." House Report at 7; 1974 U.S. Code Cong. & Ad. News at 6357. The Committee also said "[n]otwithstanding the views expressed [by the Judicial Conference] it is felt that the American people are entitled to ethical behavior on the part of all three branches of the Government, not merely the Executive or legislative branches." *Id.* at 6361.

Congress adopted a broad and sweeping *per se* rule despite warnings that it might lead to major disruption of litigation and to the loss of the judge with the most expertise in a given matter, even where the judge's financial interest in the party was insubstantial. It was aware that the rule would in at least some cases create the very type of hardships that petitioners plead here. Congress weighed these hardships against the importance of public confidence in the federal judiciary and struck the balance in favor of the latter.

Given that Congress' main concern in adopting section 455 was to promote public confidence in the impartiality of the judiciary, it is entirely consistent with congressional intent to hold that a financial interest in a class member requires recusal. While Congress did not consider or discuss the status of class members when it enacted section 455, we believe that Judge Muecke's construction of the statute effectuates the expressed congressional purpose in adopting the *per se* rule.

We conclude that the term "party" as used in section 455 must be given its broad customary meaning rather than the narrow construction suggested by plaintiffs, and hold that for purposes of the recusal statute, the term "party" includes class members. Thus, after five years of litigation, a multi-million dollar lawsuit of major national importance, with over 200,000 class plaintiffs, grinds to a halt over Mrs. Muecke's $29.70. A new judge must now be assigned to conduct further proceedings.

IV.

OTHER CONSIDERATIONS

We acknowledge that petitioners are not alone in their contention that there are serious shortcomings in section 455. The *per se* rule of recusal of section 455(b)(4) has been subject to much criticism. *See* Note, *Judicial Disqualification in the Federal Courts: A Proposal to Conform Statutory Provisions to Underlying Policies*, 67 Iowa L. Rev. 525 (1982); Note, *Disqualification of Federal District Court Judges for Bias or Prejudice: Problems, Problematic Proposals, and a Proposed Procedure*, 46 Alb. L. Rev. 229, 230 (1981); Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. Chi. L. Rev. 236, 251-68 (1978); Note, *Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. § 455*, 1978 U. Ill. L. F. 863, 870-85. The Judicial Conference of the United States has recently proposed to Congress that section 455 be amended.[17]

Congress discussed many of the arguments now being advanced by critics of section 455 when it amended that section in 1974. However, Congress did not discuss the question whether class members should be classified as parties for purposes of the *per se* rule of section 455 (b)(4), nor did Congress consider whether any reasons exist for treating class action suits differently in any respect. In the words of Judge Muecke,

> [I]t is somewhat surprising that Congress did not consider the effect of § 455 on the administration of class action

---

[17] The proposed amendment would allow a judge to accept a waiver by the parties if the ground for disqualification did not arise until after "substantial judicial time had been devoted to the matter" and the judge's interest would not be substantially affected by the outcome. Judicial Conference of the United States, 1980 Proceedings 81. The proposed amendment also provides that even "in the absence of waiver, disqualification is not required if the judge determines that the public interest in avoiding the cost of delay of reassignment outweighs any appearance of impropriety arising from his continuing with the matter to completion." *Id.* The issues raised by the proposed amendment are, of course, for Congress to consider if it wishes.

> litigation. Not only has the class action become an increasingly common form of litigation in this country, the likelihood of § 455 applying in a class action, with its many "parties", is much increased over simple litigation.

515 F. Supp. at 1080. Moreover, the administrative burden of applying section 455 in class action proceedings is far greater than in normal civil cases. Certification of the class may not occur for months, or even years, after the complaint has been filed; thus, the judge may not be able to compare his stock holdings to the class membership list until after substantial judicial resources have been invested in the litigation. Accordingly, whatever Congress may decide generally with respect to reconsidering the explicit decisions it made when it amended section 455 in 1974, the question whether and how that section should apply in class action cases would seem to warrant congressional consideration.

We note that the administrative problems of applying section 455 in class action cases are compounded by the fact that the disqualifying interest may result from the ownership of stock by a judge's spouse. Although it may be possible under most circumstances for a judge to control the extent and nature of his or her own investments, the judge may be unable to control the financial holdings or investment activities of a spouse. The day has passed when a husband can order his wife to arrange her financial affairs to suit his convenience. As increasing numbers of women establish careers, the likelihood that judges' wives will insist on asserting the right to maintain independent judgment and control over their investments also increases. Indeed, as increasing numbers of women become federal judges, the likelihood that there will be a number of judicial husbands who will pursue independent careers and treat their own investments in a similar fashion also increases. Thus, from a practical standpoint, federal judges lack control over a significant area of potential conflict under section 455: stock ownership by their spouses in class members.

It now appears that the *per se* rule may give rise to a greater number of conflicts—and a different kind—than initially anticipated by Congress. The underlying assumption—that conflicts can readily be avoided by judges following

the advice offered by Congress with regard to the management of their financial affairs[18]—may, at least with respect to class action cases, be somewhat fallacious. We recognize that this fact does not affect the question whether a class member is a party for purposes of section 455, as that provision was enacted in 1974. We think it relevant, however, to the need for a legislative evaluation of the reasonableness and consequences of the *per se* rule in class action cases and to the question whether the actual benefits of applying the *per se* rule in such cases outweigh the resultant disruption to the orderly and efficient administration of the judicial system.[19]

---

[18] The House Judiciary Committee considered, at least in part, the burden that the amendment would impose on judges:

> Under subsection (c), the judge has a duty to inform himself about his own financial interests. This precludes use of a so called blind trust.
>
> . . . .
>
> Subsection (d)(4) also provides that investments in mutual funds . . . are generally not "financial interests."
>
> These provisions of the bill with relation to disqualification based on financial interests are not intended to deprive the judge of the opportunity to make financial investments. However, they must be considered in light of Canon 5C(3) of the ABA Code of Judicial Conduct which provides:
>
> > A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.
>
> Therefore, a judge is free to invest. He should invest in companies which are not likely to become litigants in his court. If that should happen, then he must disqualify himself.

H.R. Rep. at 6357. The Judiciary Committee's suggestion that a judge invest in companies that are not likely to become litigants in the judges court is of limited utility in multidistrict class actions such as the one before Judge Muecke. There are over 200,000 class members, many of whom are corporations. It appears that disqualifications under section 455 will become the rule rather than the exception in large class actions unless judges and their families either refrain from investing or invest only in mutual or common funds.

[19] There may be other, less disruptive methods of alleviating Congress' concern that a judge not be put in the position of determining whether his interest is "substantial," whether it will be "substantially affected" by the outcome of the proceeding, or whether the public interest in avoiding delay outweighs any appearance of impropriety. For example, those questions could be decided by another judge or tribunal. Such a procedure would satisfy the concern that a judge not be the arbiter of questions involving his own self-interest, yet would prevent disruption of major litigation where the public interest so dictates.

VI.

CONCLUSION

For the reasons stated above, we reluctantly agree with Judge Muecke that class members are parties within the meaning of section 455 (b)(4), and that Mrs. Muecke's stock ownership in a class member constitutes a financial interest in a party to the proceeding. Accordingly, as Judge Muecke properly concluded, he was required to recuse himself.

The petition for the writ of mandamus is DENIED.

FILED
OCT 1 1982
PHILLIP B. WINBERRY
CLERK U.S. COURT OF APPEALS

IN RE CEMENT & ANTITRUST LITIGATION
(MDL-296)

ARIZONA v. UNITED STATES DISTRICT COURT **No. 81-7465**

FERGUSON, Circuit Judge, concurring:

I agree that Judge Muecke properly determined that he was required to recuse himself. I further agree that this court has jurisdiction under the All Writs Act to review Judge Muecke's decision.

However, this case should not be considered as one that expands the supervisory power of this court over district courts. First, the decision of the district court was one mandated by the law; this court is not reviewing an exercise of discretion. Second, the matter does not in any way determine the rights of the parties but instead is directed solely to the orderly administration of the courts, the very core of this court's supervisory power. Third, the *only* way in which the new and significant issue presented here could be adjudicated was by this court assuming jurisdiction under the All Writs Act.

Office - Supreme Court, U.S.
FILED
OCT 19 1982
ALEXANDER L. STEVAS,
CLERK

82-675

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-____

STATE OF ARIZONA, et al.,

Petitioners,

vs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Respondent,

KAISER CEMENT CORPORATION, et al.,
Real Parties in Interest.

MOTION FOR RELIEF FROM COMPLIANCE WITH CERTAIN PROVISIONS OF SUPREME COURT RULES 19.3, 21.1(b), 28.1 and 28.3

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MOTION FOR RELIEF FROM COMPLIANCE WITH CERTAIN PROVISIONS OF SUPREME COURT RULES 19.3, 21.1(b), 28.1 and 28.3

Petitioners respectfully move this Court for relief from certain provisions of Supreme Court Rules 19.3, 21.1(b), 28.1, and 28.3, or if the motion is to be denied, that it be on the basis that absent class members are not "parties" for purposes of 28 U.S.C. § 455 and Supreme Court Rule 21.1(b). In support of this motion, Petitioners incorporate by reference those arguments made in (1) the "Motion For Relief From Compliance With Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3," filed in this Court on August 16, 1982 in conjunction with a petition for a writ of certiorari, in No. 28-287, and (2) "Petitioner's Reply Memorandum in Support of 'Motion For Relief From Compliance With Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3'" in No. 82-287.

CONCLUSION

WHEREFORE, Petitioners pray this Court for an order:

(1) That Petitioners have fully satisfied Supreme Court Rules 21.1(b) and 28.1 by filing with the Clerk of this Court on August 16, 1982, as Exhibit A to the "Motion For Relief From Compliance With Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3" in No. 82-287, one copy of the Master Class List of absent class members;

(2) That Petitioners have satisfied the filing requirement of Supreme Court Rule 19.3 by filing forty (40) copies of the "Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit" and by previously filing in No. 82-287 one copy of the Master Class List of absent class members with the Clerk of the Court; and

(3) That Petitioners have satisfied the service requirement of Supreme Court Rule 28.3 by serving copies of only their petition for a writ of certiorari on respondents, the other named parties, and class members who have entered an appearance in the proceedings in the district court, and by the service of one (1) copy of Exhibit A to the August 16, 1982 "Motion for Relief from Compliance with Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3" on respondents' counsel of record in No. 82-287, who is counsel for the real parties in interest here; and that Petitioners are relieved of any obligation which might otherwise exist to serve the petition for a writ of certiorari and/or the Master Class List on all absent members of the classes, or to serve the Master Class List on any other of counsel for the real parties in interest.

Alternatively, Petitioners pray that this Court order that absent class members are not "parties" for purposes of 28 U.S.C. § 455, or the Supreme Court Rules, and that the petition as filed is in full compliance with these rules.

DATED: October 15, 1982

Respectfully submitted,

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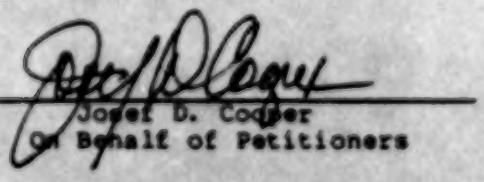
By 
Josef D. Cooper
On Behalf of Petitioners

PROOF OF MAILING - AFFIDAVIT

I, Josef D. Cooper, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th of October, 1982, I deposited in a United States Postal Service mailbox, located at the Rincon Annex Post Office, Spear and Mission Streets, San Francisco, California, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing "Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit" and "Motion for Relief From Compliance with Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3."

Josef D. Cooper

Subscribed and sworn to before me, at San Francisco, California this 15th day of October, 1982.

OFFICIAL SEAL
DOUGLAS A. MARSHALL
NOTARY PUBLIC-CALIFORNIA
CITY AND COUNTY OF
SAN FRANCISCO
My Commission Expires Oct. 9, 1984

Notary Public

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-____

STATE OF ARIZONA, et al.,

Petitioners,

vs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Respondent,

KAISER CEMENT CORPORATION, et al.,
Real Parties in Interest.

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I, Josef D. Cooper, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of October, 1982, three copies of the enclosed "Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit" and "Motion for Relief From Compliance with Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3" was served on the defendants' counsel, one copy on the plaintiffs' counsel, one copy on appearing counsel, three copies on Respondent, and three copies on the Solicitor General of the United States as identified on the attached list, by First Class United States Mail.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

In re Cement and Concrete Antitrust Litigation
(MDL Docket No. 296)

STATE OF ARIZONA, *et al.*,

Petitioners,

—vs.—

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,

Respondent,

KAISER CEMENT & GYPSUM CORPORATION, *et al.*,

Real Parties in Interest.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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On Behalf of the Real Parties in Interest

November 1982

Question Presented

Was the Court of Appeals required to issue a writ of mandamus to compel a district judge to preside over future pretrial proceedings in this multidistrict class action after the judge recused himself under 28 U.S.C. § 455(b)(4) and Canon 3C of the Code of Judicial Conduct because his wife owned stock in plaintiff class members?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

82-675

In re Cement and Concrete Antitrust Litigation
(MDL Docket No. 296)

STATE OF ARIZONA, *et al.*,

Petitioners,

—VS.—

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,

Respondent,

KAISER CEMENT & GYPSUM CORPORATION, *et al.*,

Real Parties in Interest.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

For the reasons set forth herein, the real parties in interest[1] respectfully oppose the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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1 The real parties in interest are Ash Grove Cement Co.; Citadel Cement Corp.; Columbia Cement Division of Filtrol Corporation; The Flintkote Company; Giant Portland Cement Co.; Kaiser Cement & Gypsum Corporation; Keystone Portland Cement Co.; Lehigh Portland Cement Co.; Lone Star Industries, Inc.; The Marquette

Counterstatement of the Case

In re Cement and Concrete Antitrust Litigation, MDL Dkt. No. 296, is a series of antitrust complaints against virtually all of the nation's cement manufacturers. These cases were consolidated for pretrial proceedings in the District of Arizona before Judge Carl A. Muecke. Most of these actions purport to have been brought on behalf of nationwide classes variously defined in the separate complaints. Petitioners initially sought certification in April 1977 of six nationwide classes made up largely of indirect cement users. Petitioners subsequently withdrew this request and in September 1977 filed a motion seeking certification of a single, national class of cement purchasers—a class not alleged in the original complaints. The district court first certified a "National Cement Class" on March 9, 1979, and later, at petitioners' request, modified and amended the class definition on January 15, 1980, July 16, 1980, October 20, 1980 and April 14, 1981. A Master Class List was compiled and members of the class were finally given notice in November 1980. The period for opting out of the class expired on December 31, 1980.

By letter dated January 12, 1981, the real parties in interest (defendants below) brought to Judge Muecke's attention that his 1980 Financial Disclosure Report indicated that he (and/or his wife) owned stock in a number of companies which appeared on the Master Class List and which had not opted out of the class.[2] Subsequently, Judge Muecke informed counsel

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Company; The Monarch Cement Co.; Medusa Corporation; Missouri Portland Cement Co.; Monolith Portland Cement Co.; National Gypsum Co.; OKC Corporation; Oregon Portland Cement Company; Portland Cement Co. of Utah; Universal Atlas Cement Division of United States Steel Corporation; and Whitehall Cement Company. In addition to the foregoing real parties in interest, and the additional interested parties whose names are contained on the Master Class List for the classes certified in MDL 296, which has been filed with this Court, the companies listed in Appendix I have an interest in the outcome of this case.

2 Due to the *Duplantier* litigation challenging the constitutionality of those provisions of the Ethics in Government Act requiring the public

that the Financial Disclosure Report might be out of date in certain respects. Accordingly, Judge Muecke furnished counsel updated listings, which showed that Mrs. Muecke owned stock in several companies on the Master Class List.[3]

Petitioners (plaintiffs below) served interrogatories and document requests, which established that at least seven of the companies in which Mrs. Muecke owned stock as of December 31, 1980 actually purchased cement or cement-containing products during the relevant period and were, therefore, members of the National Cement Class in accordance with the court's class certification orders. The record indicates that Mrs. Muecke had held the stock since about the time suit was filed in 1976 and that she traded in the stock during the pendency of the case. Judge Muecke candidly admitted that "the total value of the number of shares owned by [Mrs. Muecke] as it relates to [her] total financial holdings makes it of substantial importance to her." *In re Cement and Concrete Antitrust Litigation*, 515 F. Supp. 1076, 1083 (D. Ariz. 1981).

In 1974, Congress amended 28 U.S.C. § 455 to create a *per se* standard requiring recusal for a financial interest, "however small," in a party to the proceeding or in the subject matter in controversy. Courts interpreting the amended statute recognized that it mandated disqualification if the judge owned even

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filing by the judiciary of financial disclosure reports, financial disclosure reports for judges were not generally available until late 1980. *See Duplantier* v. *United States*, 606 F.2d 654, 661 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981).

3 Petitioners have noted that five Justices appear to hold stock in companies appearing on the Master Class List. This ignores the fact that the 1982 Financial Disclosure Reports are current only as of December 31, 1981. It does not follow that any Justice currently has such a shareholding. Furthermore, petitioners appear to have included in their listing at least one non-equity holding which is not a stock interest at all (*i.e.*, a debenture bond for Caterpillar Tractor listed on Justice Powell's disclosure report).

one share of stock in a party to the litigation[4] and that recusal for such stock ownership could not be waived.[5]

In light of these precedents and pursuant to the briefing schedule established by the district court, the real parties in interest filed a formal motion to recuse Judge Muecke on February 23, 1981. The motion suggested that Judge Muecke was required to recuse himself because his wife's stockholdings in class members constituted a financial interest in a "party" and in the "subject matter in controversy" within the meaning of 28 U.S.C. § 455.

After obtaining an opinion from the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States concluding that recusal was appropriate, Judge Muecke held that class members are parties for purposes of 28 U.S.C. § 455(b)(4) and therefore recused himself from further participation in this case. *In re Cement and Concrete Antitrust Litigation,* 515 F. Supp. 1076 (D. Ariz. 1981).[6]

Judge Muecke recused himself because "the law [28 U.S.C. § 455], as written, says I must," 515 F. Supp. at 1078, and

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4 See *In re New Mexico Natural Gas Antitrust Litigation,* 620 F.2d 794, 796 (10th Cir. 1980).

5 See *Potashnick* v. *Port City Construction Co.,* 609 F.2d 1101, 1114-15 (5th Cir.), *cert. denied,* 449 U.S. 820 (1980).

6 Because of his holding that plaintiff class members are "parties" for purposes of 28 U.S.C. § 455(b)(4), Judge Muecke expressly did not rule on whether he had a financial interest in the "subject matter in controversy." Petitioners erroneously suggest that the Ninth Circuit decided that Judge Muecke did not have a financial interest in the "subject matter in controversy." Petition at 5 n.5. But petitioners neglect to quote the Ninth Circuit in full (material omitted by petitioners in italics): "*While we do not ultimately decide the question here,* we have no hesitation in concluding, for purposes of our mandamus analysis, that Judge Muecke was not required to recuse himself on the latter ground." *In re Cement Antitrust Litigation,* 688 F.2d 1297, 1307 n.8 (9th Cir. 1982). Thus, neither the Court of Appeals nor Judge Muecke ruled on whether the "subject in matter controversy" prong of the statute required Judge Muecke's recusal.

because "[r]egardless of the applicability of § 455, this Court is very persuaded by the Advisory Committee's conclusions as to Canon 3C [of the Code of Judicial Conduct]," *id.* at 1079.[7]

On October 1, 1982, the Ninth Circuit issued its opinion on petitioners' request for a writ of mandamus.[8] *In re Cement Antitrust Litigation*, 688 F.2d 1297 (9th Cir. 1982). Based on a thorough analysis of the statute and its purpose, the Ninth Circuit held that Judge Muecke correctly recused himself.

> "We need not decide the general question whether class members are in fact 'parties' to a class action suit; for some purposes they are treated as such, and for other purposes they are not. Here, we need decide only if, for purposes of section 455, stock ownership in a class mem-

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7 The Advisory Committee advised Judge Muecke, inter alia, that Canon 3C "also states in effect that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including instances where he knows that his spouse has 'any other interest that could be substantially affected by the outcome of the proceeding.' " 515 F. Supp. at 1084.

8 Petitioners sought review in the Ninth Circuit of Judge Muecke's recusal decision by three avenues: they filed a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b), an appeal pursuant to 28 U.S.C. § 1291, and a petition for writ of mandamus. On October 30, 1981, the Court of Appeals entered an order denying permission to appeal pursuant to 28 U.S.C. § 1292(b), dismissing the 28 U.S.C. § 1291 appeal, and setting the petition for writ of mandamus down for oral argument. *In re Cement Antitrust Litigation*, 673 F.2d 1020 (9th Cir. 1982).

In addition to the present Petition, petitioners have filed two other petitions for writ of certiorari in this matter. The first, currently pending in this Court's docket No. 82-287, seeks review of the Ninth Circuit's October 30, 1981 dismissal of petitioners appeal of Judge Muecke's recusal decision pursuant to 28 U.S.C. § 1291 and its refusal to permit discretionary appeal of that decision pursuant to 28 U.S.C. § 1292(b). The second, a petition for prejudgment writ of certiorari of petitioners' mandamus petition to the Ninth Circuit, was dismissed by agreement of the parties after the Ninth Circuit rendered the decision which is the subject of the present Petition.

ber constitutes an interest in 'a party to the proceeding.' We agree with Judge Muecke's analysis in rejecting petitioner's argument that class members are not parties within the meaning of section 455:

> 'The problem with plaintiffs' argument is that, *where it counts,* class members and parties are identical. There is no question that class members are included in the benefits and burdens of a judgment on an equal basis with parties. For this reason, there appears to be no reason in logic why a financial interest "however small" in a named party to a litigation should be grounds for recusal, but that the same interest in a class member should not be. Neither the degree of conflict, nor the appearance of impropriety is altered by a litigant's classification as "party" or "class member." ' " *Id.* at 1310.

In deciding that for purposes of the recusal statute plaintiff class members must be treated as "parties," the Ninth Circuit looked not only to the clear language of the statute and its purpose, but also exhaustively examined its legislative history.

> "Congress adopted a broad and sweeping *per se* rule despite warnings that it might lead to major disruption of litigation and to the loss of the judge with the most expertise in a given matter, even where the judge's financial interest in the party was insubstantial. It was aware that the rule would in at least some cases create the very type of hardships that petitioners plead here. Congress weighed these hardships against the importance of public confidence in the federal judiciary and struck the balance in favor of the latter.
>
> "Given that Congress' main concern in adopting section 455 was to promote public confidence in the impartiality of the judiciary, it is entirely consistent with congressional intent to hold that a financial interest in a class member requires recusal." *Id.* at 1313.

Reasons for Denying the Writ

I. The Petition Does Not Merit Review: The Ninth Circuit Was Clearly Correct and There Is No Split in the Circuits

The instant Petition does not meet the standards for review by this Court. The Ninth Circuit's decision was clearly correct. There is no split in the Circuits; in fact, there is no contrary authority whatsoever.[9]

The Ninth Circuit, the district court, and the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States all agree that recusal was appropriate. Judge Howard Bratton of the District of New Mexico, the only other district court judge to have confronted the issue, also held recently that class members are parties for purposes of the recusal statute.[10] Indeed, it would make no sense to require automatic recusal where a judge owns only one share of stock in a named plaintiff but permit him to sit if he owns substantially more stock in some other plaintiff class member. As both the Ninth Circuit and Judge Muecke recognized, there is no

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9 Lacking any split in the circuits, petitioners are reduced to claiming that the rules of practice of this and other appellate courts do not contemplate treating plaintiff class members as parties for purposes of the recusal statute. Petitioners claim that because such rules do not separately require a master class list to be filed with the court they evidence a view "in conflict" with that articulated by the Ninth Circuit. Petition at 7-8. But, as discussed below, court rules require that parties to the proceedings and others with an interest in the outcome be identified to permit judges to evaluate possible recusal. *See* pp. 14-15, *infra*. Such rules are perfectly consistent with the Ninth Circuit's decision. In any event, rules of practice do not represent conflicting decisional authority with the Ninth Circuit's ruling, which is uncontradicted by any other judicial decision and which faithfully carries out the express intent of Congress in amending 28 U.S.C. § 455.

10 *See In re New Mexico Natural Gas Antitrust Litigation*, MDL Dkt. No. 403 (D.N.M. May 14, 1982), Opposition to Petition in No. 82-287, Appendix IV.

room under the statute for different treatment of stock ownership in named class representatives and class members because "where it counts"—*i.e.*, who wins, who loses, and how much—named class representatives and plaintiff class members are impacted identically.

Moreover, the conclusion of the Court of Appeals and the district court that 28 U.S.C. § 455 applies equally to stock interests in both named class representatives and plaintiff class members is the only acceptable result in light of this Court's decision in *United States* v. *Will*, 449 U.S. 200, 211-12 and n.11 (1980). The Court there concluded that (absent the Rule of Necessity) every Article III judge was disqualified under section 455(b)(5)(i) because as members of the class each was "a party to the proceeding." This is precisely the position advocated by the United States in its brief to the Supreme Court in *Will*. *See* Brief of Solicitor General at pp. 17-18, 25-26 ("each of the Justices of this Court is a member of the plaintiff classes certified by the district court" and subject to disqualification as "a party to the proceeding").

The unanimous view of all the courts that have considered this issue is not only compelling in logic, but also is the only view consistent with the legislative history of the recusal statute. As the Ninth Circuit recognized, Congress intentionally chose a stringent *per se* standard of disqualification for financial interest when it amended 28 U.S.C. § 455 in 1974.

Prior to 1974, section 455 required recusal by a judge "in any case in which he ha[d] a substantial interest . . . ." As might be expected, this "substantiality" standard required highly subjective decisions as to when a particular financial interest was "substantial," which led to serious after-the-fact criticism of a judge's decision to sit in a particular case where he had some financial interest.[11] As one commentator on the

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11 It was generally recognized that a judge could be "the victim of the highly ambiguous federal disqualification statute which require[d] disqualification only in cases of 'substantial' interest." Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 Law &

subject said in an article reprinted in the Congressional Record:

> "The defeat of Judge Clement Haynsworth, Jr., for the Supreme Court demonstrates that the federal law of disqualification of judges needs to be rewritten. As Justice Blackmun said of a shift in his own personal disqualification practice, 'The times have changed.'" Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 Law & Contemp. Probs. 43 (1970), *reprinted at* 117 Cong. Rec. 23712 (1971).

Therefore, in 1974 Congress abandoned the "substantial" standard and replaced it with an absolute *per se* standard, which prohibits a judge from sitting in a case when he has *any* financial interest[12] in a party to the proceeding or in the subject matter in controversy. In so doing, Congress sought to assure the appearance of an impartial judiciary[13] and to resolve "the

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Contemp. Probs. 43, 62 (1970), *reprinted at* 117 Cong. Rec. 23712 (1971). As an aftermath of the judicial confirmation controversies, 28 U.S.C. § 455 was amended "to bring it up to the standard applied in the Haynsworth case." *Id. See also, e.g., Judicial Disqualification: Hearings on S. 1064 Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1971, 1973) ("*Senate Hearings*") at 26, 28, 32, 60, 77, 117; *Judicial Disqualification: Hearings on S. 1064 Before Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 9 (1974) ("*House Hearings*").

12 The statute defines financial interest as "ownership of a legal or equitable interest, however small . . . ." 28 U.S.C. § 455(d)(4). Stock ownership is the quintessential "financial interest." See *In re New Mexico Natural Gas Antitrust Litigation, supra*, 620 F.2d at 796.

13 While the policy underlying the statutory mandate is frequently expressed in terms of whether the companies in which the judge owns stock may be viewed as benefiting from his rulings, Congress recognized that it was equally likely that a company in which the judge owned stock might be viewed as disadvantaged because the court might "lean over backwards" not to favor it. *Senate Hearings* at 43, 46; *House Hearings* at 15, 18. Thus, even where the possible financial benefit to the judge as a shareholder is not great, the company in which the judge owns stock might stand to lose a substantial amount. The design of amended 28 U.S.C. § 455 is to insure a presiding judge

dilemmas created by the loose language of [old] Section 455" which had become apparent during intensive judicial confirmation controversies. *Senate Hearings* at 24 (statement of Senator Hollings).

It is thus evident that in holding that a stock ownership interest in plaintiff class members is subject to the *per se* standard requiring recusal regardless of "substantiality," Judge Muecke and the Ninth Circuit followed the only course of action compatible with Congress' expressed intent.

II. The Purported "Administration" Problems Identified by Petitioners Offer No Reason To Disregard the Clear Mandate of Congress

Perhaps in recognition of the lack of support for their claim in the cases, statutory language, or legislative history of 28 U.S.C. § 455, petitioners make a series of arguments which do not derive from the statute but which petitioners claim are founded in general policies of efficient administration of the courts.[14] None of these arguments has merit.

A. Petitioners' Position Would Do Nothing To Alleviate the "Administration" Problems They Identify and Would Require this Court To Rewrite the Statute Enacted by Congress

Petitioners acknowledge that the Ninth Circuit was correct in analyzing the amended recusal statute in light of Congress'

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free from complaint on either ground, that is, a judge free of financial interest.

14 Petitioners also say that the issue of whether class members are "parties" for purposes of the recusal statute is present "behind the scenes" in the *Plywood* litigation. Since it appears that in *Plywood* only four individual plaintiffs (not the class) are before the Court, we doubt that this is so. But in any event this Court considers cases and controversies properly presented to it. That petitioners feel an issue may be "behind the scenes" in some other case is certainly no reason to grant certiorari in this one.

expressed intent to eliminate the need to make decisions under the ambiguous standard of whether a judge's financial interest is "substantial," but they criticize that court for not weighing what petitioners claim are two equally important considerations—"the avoidance of uncertainty in recusal matters and the disqualification of judges at the outset to minimize disruption to litigation." Petition at 11. Petitioners claim that these considerations should have led the Ninth Circuit to conclude that Congress intended stock ownership in class members to be treated under Section 455 as an "other interest," which must be substantially affected before recusal is required. Petition at 15.[15]

There are two major problems with petitioners' claims in this respect.

First, their argument is in direct conflict with the intent of Congress. Congress stated its desire to eliminate "substantiality" decisions when a judge's financial interest such as stock ownership is involved, and in so stating rejected the points petitioners raise.[16] Treating stock ownership in a class member as an "other interest" (which as noted requires recusal only if "substantially" affected) would reintroduce the need for a "substantiality" determination, thereby injecting the very ambiguity which Congress expressly attempted to eliminate as to stock ownership in amending Section 455.

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15 In amended 28 U.S.C. § 455, Congress treated non-financial interests, such as a judge's customer/user relationship to an electrical utility, as "other interests" not subject to the *per se* recusal standard. *In re New Mexico Natural Gas Antitrust Litigation, supra.*

16 The Ninth Circuit in upholding Judge Muecke's recusal decision recognized that Congress

> "was aware that the rule would in at least some cases create the very hardships that petitioners plead here. Congress weighed these hardships against the importance of public confidence in the federal judiciary and struck the balance in favor of the latter." 688 F.2d at 1313.

Second, the result urged by petitioners would not in fact cure the "problems" they raise. If, as petitioners suggest, stock ownership in class members were treated as an "other interest," recusal decisions would still be subject to the uncertainties to which petitioners object since the "other interest" could not be determined until class membership was clear. Thus, neither of the considerations identified by petitioners—uncertainty in recusal matters or disqualification of judges at the outset—are advanced by treating stock ownership in a class member as an "other interest."

In essence petitioners are asking this Court to rewrite the recusal statute which Congress enacted because they claim it "disrupt[s] the orderly litigation of class actions." Petition at 11.[17] Petitioners' claim at bottom is that the standard selected by Congress for disqualification in cases of financial interest is too stringent, and they ask this Court to substitute its judgment of what the law should be.[18] But the purported "problems" with the statute about which petitioners complain have been brought to Congress' attention, and if the law is to be

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17 The instant Petition virtually ignores 28 U.S.C. § 455 and its legislative history, treating the issue as though it involved construction of Rule 23. It does not. The issue is whether a financial interest in a class member is an interest in a "party" or in the "subject matter in controversy" as those terms are used in section 455(b). The answer is clear; the Ninth Circuit and the district court are indisputably correct.

18 The Ninth Circuit rejected a similar invitation by petitioners to rewrite section 455. While the court acknowledged the possible need for "legislative evaluation" by Congress the Ninth Circuit recognized that "this fact does not affect the question whether a class member is a party for purposes of section 455, as that provision was enacted in 1974." 688 F.2d at 1315. Likewise, a newspaper article petitioners placed in the record before the Court of Appeals reports that when asked about this case, Senator Dennis DeConcini, a member of the Judiciary Committee, commented that the law should not be "so strenuous," but said that under the present law Judge Muecke was "ethically, morally, and technically correct" and that in recusing himself Judge Muecke "did the right thing." CA 9 App. Ex. 20.

changed, it is up to Congress to do so.[19] Meanwhile, because no party is entitled to any particular judge, petitioners will suffer no injury by proceeding to try their case before another judge who does not have a financial interest in a party to the proceeding or in the subject matter in controversy.

Of course, Congress may conclude that no substantive change in the statute is needed. For when all is said and done, petitioners' complaints about the purported administrative difficulties created by 28 U.S.C. § 455 appear to have far less to do with that statute than with the logistical problems created by massive, ambiguously defined class actions where classes are repeatedly restructured for plaintiffs' convenience. Yet, as everyone who has considered the recusal issue in this case has concluded, there is no basis for suggesting that the fundamental commands of 28 U.S.C. § 455 should give way to the claimed conveniences of Rule 23.

B. The Ninth Circuit's Decision Does Not Engender "Administration" Problems In Class Actions

In any event, as we discuss below, the problems cited by petitioners in this case are illusory, especially when contrasted with the central thrust of 28 U.S.C. § 455—a trial presided over by a judge free of financial interest.

1. A Judge Can Determine in a Class Action Whether To Recuse Himself

Petitioners argue that *per se* recusal should be required only where the necessity for recusal can be determined early in the litigation, as where a judge owns stock in a named party, which can be discerned from a reading of the first page of the

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19 As both the Ninth Circuit and the district court judge observed, the Judicial Conference of the United States has recently proposed to Congress that section 455 be amended. 688 F.2d at 1313; 515 F. Supp. at 1081. The Ninth Circuit pointedly observed, "The issues raised by the proposed amendment are, of course, for Congress to consider if it wishes." 688 F.2d at 1314 n.17.

complaint. Petitioners claim that in a class action a judge cannot determine at the outset whether to recuse himself because there is no way for him to determine whether he has stock holdings in a party until the class is certified, the notice sent, and the opt out period passed.[20]

But contrary to petitioners' assumptions, in determining at the outset of any case whether he has a conflict, a judge can never content himself with an examination limited to the names of the parties listed in a complaint. This much is recognized by the very sources quoted by petitioners. For example, the testimony of Professors Hall and Miller with respect to the Financial Disclosure Act specifically notes that in determining whether he has a problem requiring recusal a judge must consider the "parties *and interests*" which may be affected by the litigation. *Hearings Before Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 488-89 (1977) (emphasis supplied), quoted in Petition at 12.[21] For this very reason a number of courts have adopted rules which specifically require attorneys to specify all persons—not merely parties and not merely parties directly participating in the case—who have "an interest" in the outcome of the proceeding. For example, in the Court of Appeals for the Ninth Circuit "[t]o enable the judges of the court to evaluate possible disqualification or recusal" counsel are required to provide the court with a list "of all persons, associations of persons, firms, partnerships, or corporations that have *an interest* in the outcome of the case." Rule 13(b)(3) (formerly Rule 13(e)) of

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20 Rule 23(c)(1) itself directs that "as soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

21 Indeed, the petitioners themselves argue that a stockholding in a class member is an "other interest" which requires recusal if it could be "substantially affected." Petition at 15. It is obvious that a determination of "other interests" which may be affected by a litigation requires an inquiry of the attorneys involved, which is exactly what Professors Hall and Miller envisaged.

the Rules of the United States Court of Appeals for the Ninth Circuit (emphasis supplied).

Exactly these inquiries can be and are made in class actions. The plaintiff's complaint in every class action contains a description of the class which the plaintiff claims to represent. A judge can as a matter of course bring the contents of his financial disclosure form to the attention of counsel for plaintiffs and defendants and ask them to notify him promptly whether, in the event that the class were to be certified, any of the companies in which he has an ownership interest would be members of the class. As a result, the court would know in short order whether it did or did not have an interest in a party or subject matter in controversy, and act accordingly.

To be sure, this procedure will not in all cases prevent a judge from discovering at some later date that he has a prohibited interest in the litigation. But that is no different in a class action than in any other case. For example, a judge who is presiding over litigation may marry only to find that the new spouse has stock in a party, or a company in which a judge has a stockholding may intervene in pending litigation, or a litigant may be acquired by a company in which a judge owns stock—all of which would require recusal after a case is underway.[22]

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22 As the Court pointed out in *Ross* v. *Houston Independent School District*, C.A. No. 1044 (S.D. Tex. June 30, 1977):

> "The primary sua sponte determination of a judge's qualification under Section 455 to sit in a case is made when the case first falls upon the judge's docket. However, the judge has a continuing duty to review the litigation and to reconsider his initial determination if there is any change of circumstances. For example, additional parties may be joined in the suit or new claims for relief may be pleaded which might require the judge's disqualification under Section 455. This judge has utilized his courtroom deputy clerk to keep abreast of the changes in the cases on his docket and to alert the judge to potential disqualification problems." Slip op. at n.16.

See also House Hearings at 16 (judge has a continuing obligation to review his investments, including contents of so-called "blind" trust).

2. Recusal in Class Action Cases Creates No Improper Disruption of Ongoing Litigation

Petitioners also contend that the Ninth Circuit's ruling would disrupt litigation at an advanced stage of the proceedings. Obviously, all other things being equal, no one, not Congress, not the Ninth Circuit, not Judge Muecke, and not the real parties in interest in this litigation, favors requiring a judge to recuse himself after the litigation is underway. But all things are not equal where a judge is called upon to rule in a case in which he has an interest, and in such cases Congress has determined that precedence is to be given to assuring a forum entirely unaffected by financial interests.

With this in mind, Congress adopted an absolute *per se* rule which does not admit of waiver, whatever the convenience of the litigants. *In re Cement Antitrust Litigation, supra,* 688 F.2d at 1311-13. *See* 28 U.S.C. § 455(e). For the same reason, Congress intentionally did away with the so-called "duty to sit" rule which, under the previous version of the statute, meant that for convenience sake "close cases involving disqualification should be resolved on the ground that the judge had a 'duty to sit.' " *SCA Services, Inc.* v. *Morgan*, 557 F.2d 110, 113 (7th Cir. 1977). Thus, by amending 28 U.S.C. § 455, Congress contemplated that in future cases where a judge discovered he had a financial interest, the case would be assigned to another judge, one free of any such interest. As Senator Burdick put it, "when there are 667 Federal judges active and retired, and at a time when Congress is asked to create an additional 62 judgeships" there is simply no reason to allow a judge as to whom there is any real question regarding disqualification to preside. *Senate Hearings* at 74 (statement of Senator Burdick); *see also Senate Hearings* at 77, 114, 118; 119 Cong. Rec. 6113 (1973) (statement of Senator Burdick).[23]

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23 The wisdom of that decision is apparent in the present case because, so far as can be discerned, most other judges in the District of Arizona have no financial interests in the litigation.

Congress recognized in enacting amended section 455 that replacement judges would not be available in the Supreme Court:

Nor will the results of occasional recusals in class actions as a result of stock ownership in class members (the present case is the only one reported in the eight years since the enactment of § 455) necessarily create undue disruption. In the instant case, the delay attendant on Judge Muecke's recusal would have been minimal had petitioners not strenuously opposed all efforts to have another judge assigned. Although petitioners suggest that under the Ninth Circuit's decision the Judicial Panel on Multidistrict Litigation may be disqualified from reassigning this case, the Ninth Circuit explicitly found that the Panel can act.[24] Moreover, the Judicial Panel has at no time suggested that it is unable to act. Rather, its failure to act can be ascribed to petitioners' repeated requests that another judge not be assigned to this case.[25]

"We have more judges now . . . . We can afford a more generous standard of disqualification than might have been the case 50 years ago or at some earlier time. The one place for which that is not true is in the U.S. Supreme Court where there is no way of getting substitution. Now that is an isolated problem and it shouldn't be allowed to control the whole system . . . ." *Senate Hearings* at 118. *See also Senate Hearings* at 61.

24 The Ninth Circuit stated: "[W]e opine that stock ownership in putative class members by judges on the Judicial Panel on Multi-District Litigation does not affect the Panel's ability to transfer the present proceedings to a new judge." *In re Cement Antitrust Litigation, supra,* 673 F.2d at 1024. As the Court of Appeals found, the possible recusal of a judge from the adjudicative phases of a proceeding does not prohibit that judge from carrying out ministerial duties short of adjudication, including assigning a case to another judge, or assigning a judge to make the assignment. *Id.* at 1024-25. In fact, even after Judge Muecke recused himself, petitioners themselves successfully petitioned him to transfer the case temporarily to another judge in the District of Arizona to rule upon certain matters.

25 For example, in response to a motion to designate a judge made in the fall of 1981 to the Judicial Panel by the real parties in interest, petitioners urged the Panel not to assign another judge, claiming that to do so before the Ninth Circuit ruled would "disregard the courtesy usually afforded other Courts," "abuse traditional concepts of comity," and "possibly moo[t] the recusal issues in the Ninth Circuit." Plaintiffs' Response to Defendants' Motion for Designation of District Court Judge dated December 10, 1981, at 4-5. The Panel's brief order

Furthermore, prompt assignment of another judge in this case would not have engendered undue delay because Judge Muecke's role in the litigation, while substantial, did not make him irreplaceable. As the Ninth Circuit stated in dismissing petitioners' appeal of Judge Muecke's recusal decision:

> "While plaintiffs' assessment of Judge Muecke's effective service should not be minimized, we should not rule out the possibility that the next judge selected by the Multi-District Panel may be even more familiar with the substantive issues of the litigation, which are as yet essentially undecided, or be aware of different pretrial or trial techniques. Thus, the ultimate disposition of this case may not be appreciably delayed at all." *In re Cement Antitrust Litigation, supra,* 673 F.2d at 1025.[26]

3. Congress Has Provided Appropriate Investment Opportunities for Judges Even in Light of Massive Class Actions

Petitioners also suggest that in a class action a judge cannot "follow the House Judiciary Committee's suggestion to confine investments to companies 'not likely to become litigants in his court.' " Petition at 7. But, as the Ninth Circuit recognized,

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"defer[ring]" assignment of another judge nowhere suggested that any other principles were involved in its decision. Petition in No. 82-287 Appendix H.

26 Because Judge Muecke viewed his role in the five years the litigation was before him as supervising discovery, he made *no* substantive rulings. Thus, pending completion of discovery, Judge Muecke declined to rule on numerous jurisdictional motions; deferred consideration of *Illinois Brick* motions against numerous plaintiffs; and refused to examine statute of limitations defenses. As a result, while Judge Muecke was surely familiar with the progress of the litigation as a result of his tenure, he did not have to confront the difficult substantive or procedural issues of the case. Indeed, the only such issues which Judge Muecke considered related to certification of the classes.

to make the statute "practical enough to be liveable,"[27] Congress established a special class of equity investments—mutual funds and the like—in which judges can invest with fewer limitations. 688 F.2d at 1308. *See* 28 U.S.C. § 455(d)(4)(i)-(iv). Congress refused to go further in safeguarding judicial investment precisely because it recognized that where ease of equity investment conflicted with the principles embodied in the recusal statute, ease of investment would have to yield. *See Senate Hearings* at 80 (a judge must "accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly").

Petitioners also claim that a judge in a class action cannot control the separate financial affairs of his or her spouse. Petition at 7. To the extent that a spouse's investments are beyond the judge's control, the situation is not confined to class actions. Thus, like all of petitioners' "administration" arguments, this argument is simply that Congress should rethink the statute it has already written, not that the Ninth Circuit or the district court misapplied that statute.

III. Mandamus Is Not Appropriate To Order a Judge To Sit Where He Has Recused Himself Based on His Uncontroverted Interpretation of 28 U.S.C. § 455 and on His View of the Ethical Considerations Embodied in the Code of Judicial Conduct

Petitioners sought appellate review of Judge Muecke's interlocutory recusal decision by petitioning for a writ of mandamus and now seek reversal by this Court of the Ninth Circuit's refusal to issue such a writ. As this Court has repeatedly emphasized: "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. . . . '[O]nly exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.' " *Kerr* v. *United States District Court*, 426 U.S. 394, 402

27 *Senate Hearings* at 37.

(1976), *quoting Will* v. *United States*, 389 U.S. 90, 95 (1967). *See also Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 661 (1978).[28]

In the present case no question has even been raised that Judge Muecke acted beyond the scope of his jurisdiction or that his decision represented a usurpation of power or involved a clear abuse of discretion. Rather, petitioners sought mandamus as a means of obtaining "supervisory" review of Judge Muecke's order. However, in light of this Court's recent decisions cited above, it is highly questionable whether so-called "supervisory" mandamus is ever appropriate for review of possible errors in the interlocutory orders of lower courts, at least absent a persistent disregard of limitations imposed by the federal rules.[29] Not only has there been no suggestion of such persistent disregard by Judge Muecke, but as previously discussed, there is also no authority even remotely inconsistent with his decision.

Apart from the general inappropriateness of "supervisory" mandamus in this context, this Court has consistently held that mandamus will issue only where a petitioner's "right" to this extraordinary remedy is "clear and indisputable." *Will* v. *Calvert Fire Insurance Co.*, *supra*, 437 U.S. at 662, *quoting Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953). And, of course, no litigant has a clear and indisputable right—or for that matter any right—to a particular judge.[30]

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28 Moreover, "it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr* v. *United States District Court*, *supra*, 426 U.S. at 403.

29 Compare *Will* v. *United States*, *supra*, 389 U.S. at 104, with *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 258 (1957).

30 *In re Cement Antitrust Litigation*, *supra*, 673 F.2d at 1024; *Hampton* v. *City of Chicago*, 643 F.2d 478, 479 (7th Cir. 1981). *See also* S. Rep. No. 419, 93d Cong., 1st Sess. 5 (1973) (litigant not entitled to judge of his choice); H.R. Rep. No. 1453, 93d Cong., 2d Sess. 5 (1974).

For these reasons, it has been held that a judge's decision to recuse himself is not subject to mandamus. *Hampton* v. *City of Chicago*, 643 F.2d 478, 480 (7th Cir. 1981).

Moreover, "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.' " *Allied Chemical Corp.* v. *Daiflon, Inc., supra*, 449 U.S. at 36. Thus, whatever the general rule where a judge recuses himself, a writ of mandamus is not appropriate in the present case to overrule Judge Muecke's exercise of discretion in applying the ethical considerations of Canon 3C of the Code of Judicial Conduct.[31] Even in the unlikely event that this Court were to conclude that the Ninth Circuit and Judge Muecke were wrong on the issues relating to section 455, that would not support an order requiring Judge Muecke to sit in the face of his ethical conclusions and those of the Advisory Committee.

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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On Behalf of the Real Parties in Interest

November 1982

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31 See pp. 4-5 and n.7 *supra*.

APPENDIX I

In addition to the real parties in interest listed in footnote 1 of this document, and the additional interested parties whose names are contained on the Master Class List for the classes certified in MDL 296, which has been filed with this Court, the following companies have an interest in the outcome of this case.

Alpha Portland Industries, Inc.
Arkansas Cement Corp.
Arkansas-Louisiana Gas Co.
Ashland Oil, Inc.
Canada Cement La Farge
Capital Aggregates, Inc.
Centex Corp.
Coplay Cement Mfg. Co.
Crane Corp.
Cyprus Hawaiian Cement Corp.
Dundee Cement Corp.
F. Ili Buzzi S.p.A. Cementi
General Portland, Inc.
Genstar, Ltd.
H. B. Zachry Company
H. K. Porter Co.
Heidelberg Zement A.G.
Holderbank Financere Glaris, Ltd.
Ideal Basic Industries, Inc.
Louisville Cement Co.
Martin Marietta Corp.
National Cement Co., Inc.
Nevada Cement Co.
Portland Cement Association
San Antonio Portland Co.
Santee Portland Cement Corp.
Societe des Cements Francais
Societe de Anonymes des Cements Vicat
Valley Cement Industries, Inc.
Vigier Cement Ltd.
Wyandotte Cement, Inc.

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No. 82-675

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, *et al.*,
Petitioners,

vs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,
Respondent,

KAISER CEMENT CORPORATION, *et al.*,
Real Parties in Interest.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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No. 82-675

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, *et al.*,
Petitioners,

vs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,
Respondent,

KAISER CEMENT CORPORATION, *et al.*,
Real Parties in Interest.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THIS PETITION RAISES AN IMPORTANT QUESTION OF LAW WHICH SHOULD BE SETTLED BY THIS COURT

A. Judge Muecke's Recusal Was Based Solely On Statutory Interpretation Applicable to All Federal Judges and Not On Any Personal Ethical Consideration

Although this petition presents a specific, limited issue of statutory construction, the real parties in interest argue that petitioners are seeking review of the district court's exercise of

its judicial discretion. The "Brief in Opposition To Petition for Writ of Certiorari" (hereinafter "Opposition Brief"), at page 5, erroneously asserts that Judge Muecke recused himself because, "'[r]egardless of the applicability of § 455, . . . [he was] very persuaded by the Advisory Committee's conclusions as to Canon 3C [of the Code of Judicial Conduct,' . . ." Accordingly, the real parties in interest argue that a writ of certiorari should not issue since, "[e]ven in the unlikely event that this Court were to conclude that the Ninth Circuit and Judge Muecke were wrong on the issues relating to Section 455, that would not support an order requiring Judge Muecke to sit in the face of his ethical conclusions. . . ." This assertion distorts the record. In fact, Judge Muecke held that he was not precluded by any ethical consideration from continuing to preside.

Real parties in interest quote only a portion of Judge Muecke's statements regarding the persuasiveness of the Advisory Committee's letter on the subject of Canon 3C. The full text of this section of his decision demonstrates that Judge Muecke was making general observations about ethical considerations and not ruling on their relevance to this case:

> Regardless of the applicability of § 455, this Court is very persuaded by the Advisory Committee's conclusions as to Canon 3C. Section 455 outlines the *legal* boundaries of when a judge must recuse himself. Canon 3C defines the ethical boundaries. Even if I could legally proceed with a case, I would refuse to do so *if I were to determine that it was ethically improper.*

(*In re Cement and Concrete Antitrust Litigation*, 515 F.Supp. 1076, 1079 (D. Ariz. 1981); first emphasis in original, second emphasis added.)

Rather, in a different portion of his opinion (at pages 1080-1081) Judge Muecke extensively considered all relevant facts, and concluded that no appearance of impropriety is created by his wife's stockholdings. Moreover, he succinctly rejected the appearance of impropriety as the basis of his recusal at page 1078:

> I have concluded that I must recuse myself not because I feel a sense of conflict, and *not because I feel that to*

continue would create the appearance of impropriety. I have concluded that I must recuse myself for the sole reason that the law, as written, says I must.

(Emphasis added.) Both Judge Muecke's and the Ninth Circuit's rulings raise a pure question of federal law for which review by this Court is appropriate—*i.e.*, is a class member a party under 28 U.S.C. §455(b)(4).[1]

B. The Problems of Judicial Administration Raised By the Ninth Circuit's Ruling Merit Review of the Issue By This Court.

The real parties in interest go to great lengths to minimize the problems of judicial administration caused by application of the *per se* recusal rule to interests in class members.[2] The Opposition Brief (at page 17) implies that since this is the only case of recusal for stock ownership in a class member in the eight years since the amendment of Section 455, it is unlikely to happen again. The short answer is that the federal judiciary and bar, like Congress, never considered the possibility that interests in class members might require *per se* recusal before the real parties in interest raised it here.

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[1] The argument (Opposition Brief at 19-21) that the Ninth Circuit erred in its interpretation of this Court's decisions regarding the propriety of writs of mandamus is not a reason to deny the writ of certiorari here. The question whether mandamus would have been an appropriate remedy had the Ninth Circuit concluded that Judge Muecke was in error has not been raised by a petition for a writ of certiorari. However, insofar as the real parties in interest have suggested this issue, it would appear to be based on a conflict between circuits (compare the Ninth Circuit opinion, Appendix A to the petition, with *Hampton v. City of Chicago*, 643 F.2d 478 (7th Cir. 1981)). Therefore, if anything, real parties in interest have actually advanced an additional reason for granting a writ of certiorari.

[2] Strangest among these is the suggestion (Opposition Brief at 13) that Judge Muecke's recusal is simply a result of "the logistical problems created by massive, ambiguously defined class actions where classes are repeatedly restructured for plaintiffs' convenience." As the real parties in interest are well aware, there is nothing ambiguous about the class definition which includes purchases of cement (for delivery in the United States) between 1968 and 1976. Moreover, the change from the class definition plead in the complaints was a result of this court's intervening decision in *Illinois Brick Company v. State of Illinois*, 431 U.S. 720 (1977).

It is highly probable that (like the class action judges before him) Judge Muecke would have finished the *Cement* litigation without ever looking at the class list and discovering Mrs. Muecke's interests had they not been brought to his attention by the real parties in interest. But Pandora's Box has been opened, and it is naive to hope that the next eight years will pass without similar challenges being made. It may well be that judging interests in class members under the "other interest" substantiality standard will not solve all of the administrative problems noted in the petition. However, it will result in less disruption, fewer mid-litigation reassignments,[3] and less burden on an already over-worked judiciary.

II.

THERE IS A CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION AND THE PRACTICE IN ALL FEDERAL COURTS, AND THERE IS NO CLEAR CONGRESSIONAL MANDATE WHICH RESOLVES THE DISPUTE

The real parties in interest assert that there is no conflict among the circuits regarding a class member's status as a party under Section 455(b)(4). Since there is no dispute that only one circuit court has ever addressed this issue, there cannot be any "conflicting decisions" in the usual sense of the term. Nevertheless, there is a definite conflict between the Ninth Circuit's ruling and the practice of all federal courts regarding the evaluation of interests in class members for disqualification

[3] Contrary to the assertion at page 17 of the Opposition Brief, the Ninth Circuit has never "explicitly found that the [Judicial] Panel can act" here to assign a new judge. Two members of the Ninth Circuit panel which declined to accept the Section 1292(b) petition and dismissed the Section 1291 appeal "opine[d]" in *dicta* that the Judicial Panel's stock ownership would not affect its ability to transfer the litigation. *In re Cement Antitrust Litigation, (MDL 296)*, 673 F.2d 1020, 1024-25 (9th Cir. 1982), *petition for cert. pending*, No. 82-287. The third member of that panel, however, strenuously disagreed and noted that the majority's statements in this regard represented the judges' "thinking," not a finding or ruling. (*Id.* at 1031.) Neither petitioners nor the real parties in interest can have any idea of the basis for the Judicial Panel's declining to assign a new judge. (*See*, Appendix H to the petition in No. 82-287.) At that time, the Panel had knowledge both that the Ninth Circuit was considering the mandamus petition and that five of its seven members had holdings in entities on the Master Class List.

purposes, which conflict merits resolution by this Court. The Opposition Brief (at pages 7 and 14) attempts to refute this conflict by citing those federal court rules which require the disclosure of entities with interests in the outcome of a case. However, petitioners suspect that, contrary to their argument, the real parties in interest are also aware that such rules have never heretofore been interpreted to necessitate the compiling and/or filing of class lists for purposes of evaluating recusals.

The real parties in interest also mistakenly assert that there is a "clear mandate of Congress" that stock ownership in class members requires recusal. (Opposition Brief at 10.) However, as noted by both Judge Muecke and the Ninth Circuit, there is no congressional mandate on the issue whether class members should be treated as parties for recusal purposes. In fact, there is no indication that the question ever occurred to the drafters of Section 455. See, *In re Cement and Concrete Antitrust Litigation, supra,* 515 F. Supp. at 1079, and *In re Cement Antitrust Litigation,* 688 F.2d 1297, 1309 and 1314 (9th Cir. 1982), Appendix A to petition at A-19 and A-28.

The "mandate" advanced by the real parties in interest is actually the legislative history regarding disqualification for interests in "parties." But, this argument begs the question since the issue here is whether the congressional statements about "parties" were intended to apply to class members. Both Judge Muecke and the Ninth Circuit recognized that there is no clear answer in the legislative history of Section 455 to the question whether class members should be treated as parties.[4]

[4] The fact that the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States concluded that Judge Muecke's recusal was appropriate is unrelated to his holding that class members are parties for purposes of 28 U.S.C. § 455(b)(4), and in no way evidences the absence of a conflict on this issue. Judge Muecke specifically recognized that "[t]he Committee did not consider the first issue raised by defendants, whether my wife's stock ownership in a class member constituted a 'financial interest in a *party* to the proceeding.'" *In re Cement and Concrete Antitrust Litigation, supra,* 515 F. Supp. at 1079. He also observed that the basis for the Committee's opinion (1) "was not specific" and (2) "suggested the applicability" of both the "subject matter" and "other" interest clauses of Section 455(b)(4) and of Canon 3C. (*Id.*) Judge Muecke specifically declined to rule on the "subject matter" provision of § 455, 515 F. Supp. at 1080, and the Ninth Circuit did not discuss the Advisory Committee's opinion at all.

Moreover, the law which has developed under Rule 23, Federal Rules of Civil Procedure, provides no definitive resolution. *See, In re Cement Antitrust Litigation, supra,* 688 F.2d at 1309-10, Appendix A at A-20-21.

The real parties in interest specifically assert (at page 11) that Congress mandated *per se* recusal for all stock interests, arguing:

> Treating stock ownership in a class member as an "other interest" (which as noted requires recusal only if "substantially" affected) would reintroduce the need for a "substantiality" determination, thereby injecting the very ambiguity which Congress expressly attempted to eliminate as to stock ownership in amending Section 455.

Yet, nothing in Section 455 constitutes a *per se* recusal rule applicable to all stockholdings.[5] In fact, stock interests, in particular, are not discussed in the statute. Neither the language or purpose of Section 455 prevents a stockholding from constituting an "other interest."[6] The legislative history does not indicate that, as a general proposition, Congress intended to eliminate the substantiality determination "as to stock ownership in amending Section 455." Rather, Congress was concerned with the nexus between the interest and the litigation, not the form of the interest.[7]

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[5] Conversely, Congress did not exempt interests other than stockholdings from the *per se* disqualification statute. Footnote 3 of the Opposition Brief observes that petitioners included a non-equity interest in a class member in their list of this Court's potentially disqualifying interests, *i.e.* Justice Powell's Caterpillar Tractor debenture. It should be noted that this debenture is convertible to stock and that the interests in a party for which Section 455 mandates recusal are not limited to equity interests. In addition, even if this Court were to limit recusal to equity interests, Justice Powell's 1982 disclosure statement shows stockholdings in two other entities on the Master Class List—Ethyl Corp. and Proctor & Gamble.

[6] For example, the substantiality test for "other" interests would apply to the recusal of a judge from a case where the issue to be decided is the extent that companies like one in which the judge owns stock must comply with onerous or expensive statutory regulations.

[7] Similarly, the Opposition Brief discusses Congress's intent to establish a *per se* recusal rule for "financial interests," as though this applies to all monetary interests and solely to monetary interests. "Financial interest" as used in Section 455(b)(4) is a term of art defining all direct interests (including, for example, a directorship) in a party or in the subject matter of the litigation. 28 U.S.C. § 455(d)(4). *See,* Judicial Disqualification: Hearings on S. 1064 Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1971, 1973) at 97.

Finally, the real parties in interest argue that there is no conflict because this Court has already ruled that class members are parties under Section 455(b)(4) in *United States* v. *Will*, 499 U.S. 200 (1980), citing footnote 11. This assertion was made to both the district court and the Ninth Circuit, neither of whom even mentioned *Will* in their decisions. Petitioners submit that this Court invoked the Rule of Necessity in *Will* because all Article III judges had interests in the subject matter of the litigation, and not because certain judges were class members. *See United States v. Will, supra* at 478.

Indeed, if the *Will* opinion had resolved this issue as suggested by the real parties in interest, there would presumably have been some reflection of this in the practice under Supreme Court Rules 21 and 28.1, which have continued to be interpreted as requiring only the listing of named parties and their parents, subsidiaries and affiliates. As noted in the petition, this Court may not have been able to grant certiorari in the *Plywood Litigation*[8] if *Will* had required that it consider interests in class members. However, the petitioners in *Plywood* did not submit a class list until after the Ninth Circuit's ruling here, presumably because neither they nor the Clerk of this Court believed them to be under any conceivable obligation to do so.[9]

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[8] *Weyerhaeuser Co. v. Lyman Lamb Co.*, No. 81-1618, and *Georgia Pacific Corp. v. Lyman Lamb Co.*, No. 81-1619.

[9] The real parties in interest claim that no recusal issue is raised by the interests of any Justice in a *Plywood* class member because "only four individual plaintiffs (not the class) are before the Court." (Opposition Brief at fn. 14.) As is apparent from the Fifth Circuit's opinion, the issues before this Court directly affect the interests of *Plywood* class members. The Fifth Circuit affirmed the district court's denial of defendants' motion for judgment notwithstanding the verdict and for a new trial at the conclusion of a jury trial (certified to proceed on behalf of the classes) which determined "all issues except the amount of damages sustained by individual plaintiffs, intervenors, and class members. . . ." *In re Plywood Antitrust Litigation*, 655 F.2d 627, 631 (5th Cir. 1981). Thereafter, on the basis of the jury's determination of defendants' liability and a class-wide measure of damages, "four members of the plaintiff classes, [including] the Lyman Lamb Company . . . moved for summary judgment as to individual damages computed in accordance with the jury's verdict." (*Id.* at 632.) Since the appeal was taken from the Rule 54(b) judgments entered in favor of certain class members as individuals, the real parties in interest here claim that the class is not before this Court. In fact, among the issues upon which certiorari was granted is the measure of damages which is to be applied on a class-wide basis.

III.

CONCLUSION

For the foregoing reasons, as well as those contained in the petition, this petition for a writ of certiorari should be granted.

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